INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



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Title: Nature, Scope, and Voluntariness of Consent

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Nature, Scope and Voluntariness

of Consent *

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Lawyers Association

Roundtable Session

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*__Note__: More extensive materials may be obtained directly from Ron Sailon at the October 5, 2004 (7:45 to 8:45 a.m.) Roundtable Session

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COURSE OUTLINE

1. Introduction.

Approximately 98% of all searches conducted by police officers are consent searches. Rebecca Strauss, "We Can Do This the Easy Way Or the Hard Way: The Use of Deceit to Induce Consent Searches," 100 Mich. L. Rev. 868, 870 (2002). Consent to search is one of the best and most efficient tools a police officer has. Indeed, law enforcement would be far more difficult and less effective if it were not for consent searches. A consent search saves the time and burden of obtaining a search warrant, and it is valid even when it would have been easy to obtain a search warrant. Perhaps more importantly, it allows an officer to conduct a search even when the officer lacks probable cause. Frequently, a search conducted with a subject's consent is more extensive than a search warrant would have allowed. Arguably, consent searches are also advantageous to the person being searched, as they enable police to investigate in situations where the stigma and embarrassment of an arrest or search pursuant to a warrant may be avoided. U.S. v. Rothman, 492 F.2d 1260, 1264 (9th Cir. 1973), citing, Schneckloth v. Bustamonte, 412 U.S. 218, 228, 93 S.Ct. 2041, 2048 (1973). The U.S. Supreme Court recently set forth its philosophy about consent searches:

> "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion." U.S. v. Drayton, 536 U.S. 194, 207, 122 S.Ct. 2105, 2114 (2002).

This course will examine the nature, scope, and voluntariness of consent, with a particular emphasis on cases from the U.S. Supreme Court, the Ninth Circuit Court of Appeals, and the Nevada Supreme Court.

2. Consent searches are a matter of voluntariness, not knowing and intelligent waiver of Fourth Amendment rights; government has burden of proof.

Is consent properly seen as a matter of voluntariness, or as a matter of knowing waiver? In other words, is consent valid because the subject has made a free choice, or is consent valid because the subject has intentionally relinquished a known right? If a matter of free choice, then there would be no need to first admonish the subject of his constitutional right to refuse consent. However, if a matter of knowing waiver, there would be a need to first admonish the subject of his rights in much the same fashion as officers are required to give a subject a Miranda warning.

The U.S. Supreme Court resolved this debate in Schneckloth v. Bustamonte, supra, holding that consent is a matter of voluntariness, not knowing waiver. The Supreme Court reasoned that a waiver is required for Fifth and Sixth Amendment rights (and hence, the Miranda warning is required) because Fifth and Sixth Amendment rights are necessary for a fair trial. A waiver is not required for Fourth Amendment rights, on the other hand, because Fourth Amendment rights are not necessary for a fair trial. Thus, the government does not need to prove that the subject was advised of his right to refuse to give consent to a search and waived that right. Instead, the government must prove that the consent was voluntary. The fact that the subject did not know and was never advised that he could refuse to give his consent to a search is just one of many factors to be considered in determining whether the consent was voluntary.

There is no presumption of invalidity if an individual consents without being advised of his right to withhold consent. U.S. v. Drayton, supra. However, the burden is on the government to prove voluntariness. "Clear and persuasive evidence is required . . . " Alejandre v. State, 903 P.2d 794, 798 (Nev. 1995). Because it is up to the government to prove voluntariness, it is always a good idea, whenever feasible, to obtain written consent. The Nevada Supreme Court

has specifically stated that a subject's "...signature on the consent to search which states expressly that the signer has a right to withhold consent is persuasive evidence of the voluntariness of his consent." Sparkman v. State, 590 P.2d 151, 154 (Nev. 1979); U.S. v. Wasserteil, 641 F.2d 704, 707 (9th Cir. 1981) (significant that the written consent form was signed and that the form informed him of the rights he was waiving by his consent).

3. Officer's reasonable belief in voluntariness is sufficient, notwithstanding that citizen did not actually voluntarily consent.

Totality of the circumstances is the test for determining voluntariness. In Schneckloth v. Bustamonte, supra, the Supreme Court said that a court must examine "all the surrounding circumstances to determine if in fact the consent to search was coerced." (emphasis added). What if the subject reasonably appeared to give his consent, but it later turns out that the subject didn't in fact give his consent? For example, what if the person who gave consent reasonably appeared to be mentally competent, but in fact, the person was, unbeknownst to the officer, insane? Was the consent voluntary? The test is an objective one and therefore the consent should be regarded as voluntary as long as the officer's belief that the consent was voluntary was a reasonable one. U.S. v. Patayan Soriano, 346 F.3d 494, opinion amended and superseded on denial of rehearing, 361 F.3d 494, 502 (9th Cir. 2004).

4. Scope of consent.

a) A search is always limited by the terms of the consent given.

If the subject says, "You may search the kitchen," the consent to search does not include the subject's bedroom. A consent search cannot exceed, in duration or physical scope, the limits of the consent given. U.S. v. Sealey, 830 F.2d 1028, 1032 (9th Cir. 1987).

b) When the terms of the consent given are not clearly stated, a court must assess what a reasonable person would have understood by the exchange between him and the officer, and the scope of a search is generally defined by its expressed object.

Frequently, the subject will not spell out the boundaries of the search to which he consents. When the subject does not condition or qualify his consent, there may be a question about where the officer may search. If the officer asks to search "the car," does that mean the officer can dismantle the car? Search closed and locked containers? Search open and unlocked containers?

The most important case on the subject of the scope of consent is Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801 (1991). The Supreme Court said that (1) a court must assess what a reasonable person would have understood by the exchange between him and the officer, and (2) the scope of a search is generally defined by its expressed object.

Thus, for example, if an officer asks for consent to search "the car for drugs" (drugs being the expressed object of the search), and if the person giving consent places no explicit limitation on the scope of the search, he is present during the search and raises no objection to it, and the circumstances surrounding the search do not imply that it was to be limited, the officer may normally search anywhere in the car that might have drugs and in any container therein that might have drugs, so long as the search does not involve the destruction of property. U.S. v. Gutierrez-Mederos, 965 F.2d 800 (9th Cir. 1992); U.S. v. Cannon, 29 F.3d 472 (9th Cir. 1994); U.S. v. Reeves, 798 F.Supp. 1459, aff'd, 6 F.3d 660 (9th Cir. 1993).

c) State v. Johnson, 993 P.2d 44 (Nev. 2000).

Generally speaking, consent to search a vehicle allows an extensive search. Note, however, that a closely divided Nevada Supreme Court invalidated a search where the officer removed the backseat from the car, pulled up the carpet in the backseat area, and removed screws

on the dashboard just below the glove box -- despite the fact that all of this was accomplished without the destruction of property. State v. Johnson, supra. The Nevada Supreme Court was concerned with the invasiveness of the search, despite the fact that the invasive search at issue did not involve the destruction of property. Thus, the Nevada Supreme Court has taken a slightly more restrictive view of scope of consent than the Ninth Circuit (See for example, U.S. v. Gutierrez-Mederos, supra) and most courts (see for example, U.S. v. Ramstad, 308 F.3d 1139 (10th Cir. 2002); U.S. v. Alcantar, 271 F.3d 731 (8th Cir. 2001); U.S. v. Zapata, 180 F.3d 1237 (11th Cir. 1999)).

d) Choose the right words when asking for consent.

Because the scope of consent is objective reasonableness (i.e. what would a reasonable person have understood by the exchange between the officer and the suspect?), it is better, when seeking consent, to ask for permission to conduct "a search" or even "a complete search" rather than to ask for permission to "look" or "scout" or "peek." The word "search" implies something more than a quick superficial look. The word "search" implies "rummaging," "looking through," and "probing." State v. Johnson, supra, 93 P.2d at 49, citing, in dissent, U.S. v. Snow, 44 F.3d 133, 135 (2d Cir. 1995). Words like "look," "scout," or "peek" suggest something less than a complete search.

e) It's important to clarify the expressed object when asking for consent.

Because the scope of consent is generally defined by its expressed object, it is better, if not essential, when seeking consent, to explain what the search is for. If the officer states that the search is for drugs, the officer is generally permitted to search any place -- within reason -- that might contain drugs, as long as the officer doesn't break or destroy anything or, as the Nevada Supreme Court said in State v. Johnson, supra, the search is not too invasive. Without

explaining the object of the search, the officer risks unnecessarily creating an issue about the scope of the search. The defendant can, for example, later claim that he assumed that the officer was searching for a large object, and that it is, therefore, unreasonable to believe that the defendant had consented to the search of small containers.

f) Officers should consider the consenter's location when determining scope of consent.

When the person giving consent has not conditioned or qualified his consent, it is important to consider where that person is located during the search. The failure to object is considered as an indication that the subject consents to the continuation of the search the officer is performing. U.S. v. Cannon, supra, citing, U.S. v. Sierra-Hernandez, 581 F.2d 760, 764 (9th Cir.), cert. denied, 439 U.S. 936, 99 S.Ct. 333 (1978); U.S. v. Perez, 37 F.3d 510, 516 (9th Cir. 1994); U.S. v. Mines, 883 F.2d 801, 804-05 (9th Cir.), cert. denied, 493 U.S. 997, 110 S.Ct. 552 (1989) ("[defendant's] failure to [withdraw or limit his consent during the search] indicates he consented to the search and everything it revealed"); U.S. v. Rubio, 727 F.2d 786, 796 (9th Cir. 1983).

(i) Distinction between general and limited consent

The failure to object is considered an indication that the subject consents to the continuation of the search the officer is performing if, and only if, the person consenting has given general (that is, not limited) consent. Thus, for example, if a person gives consent to a "real quick peek inside the car"(a limited consent), and that person fails to object as the officer engages in a very thorough search of the trunk, the failure to object is not an indication that the person consents to the continuation of the search to include the trunk. A reasonable person would have understood that the scope of consent was specifically limited to a "real quick peek inside the car," not a search of the trunk - much less a thorough search of the trunk.

(ii) Consent as including trunk

Be aware that the Ninth Circuit has said "a suspect's consent to search a car may not automatically include consent to search the trunk . . ." U.S. v. Cannon, supra, at 477 (9th Cir. 1994) (emphasis added). However, if a person gives general consent to "search" (as opposed to limited consent to "peek inside") his car for drugs, the consent almost certainly extends to the trunk because the trunk is a place where drugs might be found, particularly if the person is present during the search and raises no objection to the search of the trunk. Nevertheless, to establish the right to search the trunk, it always helps if the person signs the written consent form which sets forth that the person is consenting to a "complete search." cf., U.S. v. Reeves, supra, 798 F. Supp. at 1472. To be safe, an officer could specifically indicate on the form that the trunk is included in the contemplated search.

(iii) What if consenter not in a position to object to continuation of search?

A question may come up about the legal significance of failure to object to the continuation of the search if the consenter is not in a position to observe the search. That issue has received scant attention by the courts. In U.S. v. Cannon, supra, at 477 (9th Cir. 1994), the Court said that "Failure to object to the continuation of a vehicle search after giving general consent to search is properly considered an indication that the search was within the scope of the initial consent." (internal quotations and citations omitted). In that case, the defendant was sitting in the patrol car when he gave consent. He didn't object as the officer searched under the hood, in the passenger compartment, and inside the trunk. The Court didn't discuss whether the defendant had a view of the search.

If it is possible to conduct the search in the consenter's view without compromising safety or any other law enforcement objective, officers should consider doing so. That way, the

consenter's failure to object will undisputably be considered as an indication that the search was within the scope of the initial consent.[1]

g) Content of consent form.

A written consent form should ask for consent for "a complete search without limitation..." Moreover, a consent form should ask for authority to take anything found during the search, and to subject anything taken to a subsequent search. By signing such a consent form, one is giving officers considerable latitude indeed. Since the scope of a search is generally defined by its expressed object, a written consent form should have a blank space for officers to set forth the object of the search. When filling out a written consent form, it is important to describe in broad language both the place to be searched and the object of the search, e.g., it might be better to state, "All real and personal property and appurtenances at 1000 Green Valley Parkway..., for weapons, narcotics, contraband, or evidence of unlawful activity" than to say "the house at 1000 Green Valley Parkway . . . for weapons." If the officer only says, "the house at ...," that might be interpreted in such a way as to exclude the garage, the shed, etc.; and if the officer only says "weapons," he is limited only to the places where weapons might be. The language of a written consent form generally governs the scope of a search, Reeves v. U.S., supra, 798 F. Supp. at 1470.

[1] In U.S. v. McSween, 53 F.3d 684, 688 (5th Cir. 2003), the Fifth Circuit Court of Appeals seemed to be unwilling to hold that a person must be in a position to see the continuation of the search in order for the rule articulated in U.S. v. Cannon, supra (i.e., Failure to object to the continuation of a vehicle search after giving general consent to search is properly considered an indication that the search was within the scope of the initial consent) to have vitality. Compare, State v. Troxell, 78 S.W.3d 866, 873 (Tenn. 2002) (rejecting state's argument that defendant's failure to object to or limit the search supported the conclusion that the scope was not exceeded where "defendant had been led to the side of the road by another officer for the purpose of getting him out of the way as the search progressed"). It appears to be an open question in our jurisdiction whether failure to object is an indication that the search was within the scope of the initial consent even if the search wasn't conducted in the consenter's view.

h) It's important to consider circumstances or statements which arguably conflict with consent, such as when a person gives consent while at the same time representing that the area to be searched is inaccessible.

The scope of consent is not determined simply by what is said between the officer and the subject; one must also consider the implications of what is said, as well as the surrounding circumstances. If, for example, the subject says that he consents to the search of the trunk of his vehicle, but adds that the trunk is locked and he doesn't know where the key is, the totality of circumstances must be examined to see if it would be reasonable to infer that the subject would consent to a search of the trunk if, for example, the officers were to find the key, if the trunk were easily accessible from the rear seat, or if the trunk could be pried open without the key. These are the sorts of matters about which not all courts are likely to agree. Generally speaking, if a person gives consent to search but claims that there is no way to access a particular place (e.g., he claims he doesn't have a key to the trunk), a court may conclude that the consent does not include within its scope the area that the person stated was inaccessible. On the other hand, the court might conclude otherwise given additional circumstances (e.g., the person giving consent makes an effort to assist the officer in gaining access, he does not object as the officer gains access, or he makes clear statements indicative of his willingness to allow a search of the supposedly inaccessible place (e.g., "If you can get to it, be my guest"). The point is, consent is not to be easily inferred. When in doubt, it is prudent to specifically ask for consent (e.g., "May I remove the back seat?" or "May I get a locksmith?").

i) Special consent issues presented by use of drug-sniffing dogs.

Special scope of consent questions may be presented when canines are to be used in a search. Before examining those issues, it might be useful to quickly review three basic rules. First, a sniff by a trained drug-sniffing dog in a public place is not a "search" within the meaning

of the Fourth Amendment. U.S. v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637 (1983) (sniff of luggage at airport terminal); Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000) (exterior sniff of automobile); U.S. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993) (search of storage unit); Gama v. State, 920 P.2d 1010, 1014 (Nev. 1996) (exterior of vehicle).[2] Second, an alert by a trained and reliable drug-sniffing dog constitutes probable cause to search. U.S. v. Garcia, 205 F.3d 1182, 1187 (9th Cir.), cert. denied, 531 U.S. 856, 121 S.Ct. 138 (2000). Third, if the officer lacks reasonable suspicion that the property to be searched contains contraband, the dog sniff can't extend the duration of the encounter. See, Gama v. State, supra (where a police officer stopped a car for speeding, had a hunch - as opposed to reasonable suspicion - that the driver possessed drugs, the dog arrived on the scene prior to the time the citation was completed, and there was no evidence that the officer delayed the citation, the sniff was upheld).

Having quickly reviewed the above three rules, the question arises in a variety of contexts whether the scope of the consent to search includes consent to the use of a canine in the search. And, of course, the answer depends on the context. Generally,[3] as long as (1) the person giving consent didn't say that his consent didn't include the use of a drug-sniffing dog, (2) that person watched the search and expressed no objection to the continuation of the search with use of the dog, and (3) the person gave consent under circumstances where it would have been reasonable for him to expect that a dog would have been used (e.g., the officer asking for consent clearly

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[2] Caveat: A dog sniff of a residence from outside or a dog sniff of a person is different. See, B.C. v. Plumas School District, 192 F.3d 1260 (9th Cir. 1999) (Dog sniff of high school students infringed student's reasonable expectation of privacy, and thus constituted a "search" for Fourth Amendment purposes; close proximity sniffing of the person is offensive whether the sniffer be canine or human); State v. Ortiz, 600 N.W. 2d 805 (Neb. 1999) (Under the federal and state constitutions, a canine sniff for illegal drugs conducted at the threshold of a dwelling detects information regarding the contents inside the home, and the individual has a legitimate expectation of privacy inside the home even as to these unworthy contents).

[3] This is an area of the law about which not all courts agree, and there is no definitive case from the U.S. Supreme Court, the Ninth Circuit, or the Nevada Supreme Court. Nonetheless, the rule being set forth here in the Course Outline accurately reflects a fair consensus of the caselaw.

was a K-9 officer, and the dog was present and in view when the consent was given), the use of the dog will be considered to be within the scope of consent. If any of those three factors are missing, the officer would be best advised to specifically ask for consent to use a drug-sniffing dog to search the interior of a car.

j) Special consent issues presented by closer examination of items found during search for particular object(s).

As officers rummage through things during their search, questions can arise regarding how closely officers can examine things they find. For example, if an officer gets consent to search a car for drugs, and finds a letter stuffed in an open envelope or sees a cassette tape, the officer can't read the letter or listen to the tape. A reasonable person would understand that a search for drugs doesn't extend to reading letters or listening to tapes. An officer must stick to searching for the expressed object of the search to which was consented.

A voluntary consent can be the basis for a seizure as well as for a search. However, the same considerations applicable to searches apply to seizures. Thus, if an officer is given consent to search a car for drugs, a reasonable person would understand that a search for drugs doesn't extend to seizing anything the officer desires (e.g., letters, tapes, etc.).

To deal with these specific sorts of issues, a voluntary consent form should be designed to give an officer fairly broad rights when it comes to searching and seizing.

k) More on special consent issues presented by closer examination of items found during search for particular object(s): Arizona v. Hicks and U.S. v. Mines.

In Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987), officers searching an apartment, under exigent circumstances, for a shooter, victims, or weapons, saw a stereo which they suspected was stolen. An officer moved the stereo in order to see the serial number. He then was able to confirm that the stereo was stolen. The Supreme Court said that while moving

the stereo equipment wasn't a seizure, it was a search. Since the officer didn't have probable cause, the search was illegal.

This ruling was distinguished and arguably[4] somewhat limited by the Ninth Circuit's ruling in U.S. v. Mines, supra. In that case, officers reasonably believed that a man whom they detained at an airport possessed drugs. Officers got voluntary consent to search the man's bag for drugs. Inside the bag, the officer found a machine gun. An officer removed the gun, turned it over to see the serial number, and confirmed that the gun was stolen. The Ninth Circuit distinguished Arizona v. Hicks in three ways. First, Hicks involved a search inside a dwelling (where the expectation of privacy is greater); Mines, on the other hand, involved a search in a public place (an airport). Second, Hicks involved a search pursuant to exigent circumstances; Mines, on the other hand, involved a consent search. Third, Hicks involved moving a stereo; Mines, on the other hand, involved moving a gun, and guns may be removed for officer safety. In moving the gun for officer safety, serial numbers may be checked even though examination of the serial number involves a search unrelated to the expressed object of the search, e.g., drugs. The Ninth Circuit said the search of the gun for a serial number was within the scope of consent.[5]

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[4] See second paragraph of footnote number 8, infra.

[5] U.S. v. Mines has been cited in many unreported Ninth Circuit cases and state courts within the jurisdictional limits of the Ninth Circuit. The following cases are set forth for illustrative purposes:

U.S. v. Lara, 932 F.2d 973 (unreported) (9th Cir. 1991) (During a consent search of a store, officer found an Uzi automatic pistol in a box in a drawer. The officer removed it, unloaded it, and determined that the serial numbers had been obliterated. The officer seized it. Officer found an AR-15 semi-automatic rifle in plain view in the rear of the shop. While disarming it, the officer noted that its serial numbers had also been obliterated. The officer seized the rifle. Relying on Arizona v. Hicks, defendant argued that when the officer picked up the weapons to disarm them and discovered the serial numbers were obliterated, he exceeded the scope of the search. The court said that with respect to the question of the officer's right to examine the guns once they lawfully came upon them, Mines was dispositive. The guns were picked up for officer safety. Once they were lawfully picked up, the officer could examine them for serial numbers).

U.S. v. Montoto, 902 F.2d 1580 (unreported) (9th Cir. 1990) (Defendant showed officer 4 handguns and placed them on the back seat of the police car in plain view. Accordingly, defendant had no reasonable expectation of privacy

The Mines decision doesn't mean that an officer conducting a consent search can read letters or listen to tapes (See, Section 4(j) of this Course Outline), but it does mean that an officer can move and closely examine a weapon to see if it is evidence of crime (e.g., to see if it is stolen or otherwise unlawfully possessed). Still, because the Nevada Supreme Court hasn't issued an opinion in this area and because the Nevada Supreme Court is sometimes more restrictive than many courts when it comes to the law of search and seizure,[6] an officer wishing to move and examine a gun he finds during a consent search may wish to, perhaps in an excess of caution, ask

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with respect to the guns and could not object to a routine police check of their serial numbers. Since officer "lawfully possessed the [guns, they] could be examined for serial numbers," citing to U.S. v. Mines).

State v. Wilson, 1998 WL 847110 (unreported) (Wash. App. Div. 1, 1998) (During valid traffic stop, police discovered that defendant had a concealed weapons permit and was carrying a loaded handgun. Concerned for their safety, the officers obtained possession of the weapon and returned to their patrol car. Once inside, the police radioed dispatch to determine whether the weapon was stolen. When dispatch responded that the weapon had been reported stolen, defendant was arrested. The court rejected defendant's contention that officer should not have taken the loaded revolver to his patrol car. The court said, "Given the lateness of the hour, the rainy and wet weather conditions, and the presence of another occupant in [the defendant's] car, the officer's actions were both prudent and reasonable." The court also rejected defendant's further contention that officer had no valid reason for examining the serial number. The court said defendant's argument was based on the erroneous belief that the officer needed to believe the gun had some evidentiary value before he could examine it for serial numbers, and explained that U.S. v. Mines distinguished Arizona v. Hicks, and that based on the differences between those cases, the inescapable conclusion was that once the officer lawfully obtained possession of the gun, he was also in lawful possession of the serial numbers).

[6]Consider for example that despite the fact that the U.S. Supreme Court has long ago declared that probable cause alone is all that is needed for a vehicle search, the Nevada Supreme Court requires probable cause and an exigent circumstance to do a vehicle search. (And then, to meet the need for an exigent circumstance, the Nevada Supreme Court created an exigent circumstance that does not exist in any other jurisdiction, i.e., the "roadside exception.")

As another example, the Nevada Supreme Court says that in the context of a vehicle search, a search incident to arrest requires probable cause and an exigent circumstance. Under federal law, and the law in perhaps every other state, a search of a vehicle incident to arrest does not require probable cause nor an exigent circumstance. Thus, in Nevada, we are left with the anomalous result that in a home, where the expectation of privacy is certainly greater than it is in a car, a search incident to arrest requires neither probable cause nor an exigent circumstance, and yet in a vehicle, where the courts have long recognized that there is a reduced expectation of privacy, the Nevada Supreme Court will not condone a search incident to arrest without both probable cause and an exigent circumstance.

As yet another example, the Nevada Supreme Court extended the holding in Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S.Ct. 2091, 2099 (1984) (i.e., that "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed") to the commission of a gross misdemeanor. Edwards v. State, 808 P.2d 528 (Nev. 1991). Nevada may be the only state in the country to have ever declared a gross misdemeanor to be a "minor offense" for purposes of Welsh v. Wisconsin.

Also, as noted in Section 4(c) of this Course Outline, the Nevada Supreme Court takes a narrower view of the scope of consent to search than many if not most courts.

Despite the Nevada Supreme Court's clear willingness to depart from federal law, it would truly be amazing if the Nevada Supreme Court would rule that Arizona v. Hicks means that an officer cannot closely examine any gun he finds during a consensual search for serial numbers.

the subject for specific consent to remove and examine a gun which is not part of the expressed object of the search.[7] However, if an officer, again in an excess of caution, asks for consent to check on the serial numbers of a gun and is denied consent, the officer ought to check the serial numbers anyway. In the final analysis, an officer might be considered derelict in his duty if he didn't.

If an object other than a gun is found during a search, and closer examination of that object (e.g., examining serial number) is unrelated to the objective of the search to which the subject consented, or the incriminating nature of the object is not immediately apparent, such closer examination is not within the scope of consent.[8]

l) Search is over when the officer finds what he is looking for.

Once the officer finds the expressed object of the search, any continuation of the search is beyond the scope of consent. Thus, if an officer gets consent to search a car for a particular firearm and finds it, he cannot keep searching the car to see what else he might find. On the

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[7] On a related issue, officers can, of course, frisk a vehicle for weapons when they reasonably believe the occupant is armed. U.S. v. Nam, 1 Fed. Appx. 738 (unreported) (9th Cir. 2001) (officer had reasonable suspicion that motorist was armed, and thus Terry pat down for weapons was proper and drugs could be seized; motorist's furtive movements within car, his failure to get out of the car immediately after officer ordered him to, his lack of identification, large amounts of unexplained cash, and implausible answers to questions led officer to reasonably suspect that motorist was involved in dealing narcotics which, in turn, provided basis for frisk). It doesn't matter whether the gun is lawfully possessed: A legally possessed weapon represents just as great a danger to an officer's safety as an illegal one. State v. Wilson, 1998 WL 847110 (unreported) (Wash. App. Div. 1, 1998).

[8] Prior to Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967), a doctrine known as the "mere evidence" rule prevented the seizure of items whose only interest to the government was their introduction at trial to prove the government's case. Instrumentalities and fruits of crime could be seized, but "mere evidence" couldn't. Warden overturned that doctrine. See, Taylor v. State of Arizona, 471 F.2d 848 (9th Cir.), `cert. denied, 409 U.S. 1130, 93 S.Ct. 948 (1973) (seizure of photograph of defendant wearing a straw hat of the type found at the scene of the robbery, which was seized by the arresting officers in plain view was valid); U.S. v. Calhoun, 542 F.2d 1094 (9th Cir.), cert. denied, 429 U.S. 1065, 97 S.Ct. 792 (1977) (While searching an apartment, officers, who were investigating a heroin distribution ring, found 2 boxes in the clothes hamper. The boxes were labeled mannitol, a cutting agent often associated with the distribution of heroin. Held: There was a sufficient link between the boxes and the criminal behavior under investigation to justify the seizure).

While the cases applying Mines (See footnote 5, supra) involve guns, one might be tempted to argue that the first two distinctions Mines made to Arizona v. Hicks (search in public place v. home, and consent search v. search under exigent circumstances) would allow an officer to move and record serial numbers on suspected stolen property (other than guns) on less than probable cause. However, this probably would not succeed; it might get an officer

other hand, if there is no particular reason to assume that the officer has found everything he is looking for, the officer does not need to terminate the search simply because he has found some of what he is looking for. Thus, for example, if the officer obtains consent to search a car for drugs, the officer doesn't have to terminate the search once some drugs are found; the officer may reasonably believe that if he has found some drugs, there are probably more drugs yet to be found.

m) If consent to search is given to one officer, the scope of consent is not exceeded if other officers assist in the search.

The rule in the Ninth Circuit is this: once consent to search has been obtained from one with authority to give it and given to a person the consenter knows is a law enforcement official, any expectation of privacy has been lost. The assistance of additional officers in the search doesn't diminish the consenter's expectation of privacy. Of course, the additional officers are restricted to the scope of consent originally given. U.S. v. Rubio, supra; U.S. v. Bramble, 894 F. Supp. 1384, aff'd, 103 F.3d 1475 (9th Cir. 1997). (This is a broader rule than prevails in some jurisdictions. See, for example, Mickelson v. State, 906 P.2d 1020 (Wyo. 1995)).[9]

n) When it comes to a search of a person (as opposed to a vehicle or premises), an officer needs to take into account the person's location at the time of the search in determining what a reasonable person would have understood by the exchange between him and the officer.

The same rules and principles that apply to vehicle searches or premise searches apply to searches of the person. Thus, if an officer asks for permission to search a person for drugs, the scope of the search must be limited to what a reasonable person would understand such a search to entail. Generally, if the search is not carried out in a public place in the presence of others,

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around Hicks, but not around Florida v. Jimeno's rule that the scope of consent is generally defined by its expressed object. See, Section 4(b) of this Course Outline.

[9] See, infra Section 6(a) of this Course Outline for a discussion of the legal ability of undercover officers who have been invited into a suspect's home and established probable cause to invite other officers inside.

and if it is conducted by an officer of the same sex as the person to be searched, the search would normally entail a traditional Terry frisk. However, a more limited pat-down (e.g., search with a handheld magnetometer, pat-down of pockets, pat-down of sides, stomach, back, and shoulders – but no pat-down of genitals) may only be permitted in other circumstances where the search is more likely to result in embarrassment (e.g., search to be conducted in a crowded public place in the presence of passerbys). Thus, the location of the search of a person is a factor in determining the scope of the search.

- o) During a consensual frisk of a person, an officer may seize an object if, by the distinctive plain feel of the object, the officer has probable cause to believe the object is contraband – not because of the subject's consent, but rather because of the plain feel doctrine (or alternatively because of the search incident to arrest exception).

If an object is detected during a pat-down search, can the officer lift or remove the subject's clothing so that the object may be recovered? It depends. If the officer never specifically asks for such permission to lift or remove clothing and does not have probable cause to believe that the object is contraband (e.g., the object doesn't have a distinctive feel), the officer does not have the right to remove or lift clothing to see what the object is.

However, if, by the distinctive "plain feel" of the object, the officer has probable cause to believe that the object is contraband (e.g., bricks of cocaine), the officer may seize the object -- not because the seizure is within the scope of the defendant's consent, but rather because the seizure is justified by an independent exception to the Fourth Amendment (i.e., the "plain feel" doctrine, a corollary of the "plain view" doctrine). Alternatively, once the officer recognizes, by the plain feel of an object, that the object is contraband, the object may be searched incident to arrest. U.S. v. Pace, 709 F. Supp. 948, aff'd, 893 F.2d 1103 (9th Cir. 1990).

p) In order to withdraw or limit consent, a subject must give a clear and unequivocal indication that the consent is being limited or withdrawn.

Aside from making statements which clearly and unequivocally indicate that the consent is being limited or withdrawn (e.g., "Stop searching this instant!" or "Give me back my briefcase" as the officer is about to search the briefcase), the withdrawal of or limitation on consent can be manifested by the subject's conduct (e.g., slamming the trunk shut as the officer is about to look inside the open trunk). However, withdrawal of or limitation on consent will not be easily inferred. Thus, if during the search of a car, the car's owner says, "Come on, you're taking too long; I don't have all day," such whining or complaining is not a clear and unequivocal indication that the consent is being withdrawn or limited.

5. Voluntariness of consent is determined by the totality of circumstances. There are at least 9 factors which may be considered, some of which are more important than others.

a) Introduction.

When faced with having to determine whether consent is voluntary, the Ninth Circuit lists the following factors: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that he had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. U.S. v. Castillo, 866 F.2d 1071, 1082 (9th Cir. 1988); U.S. v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000). The presence or absence of one of these factors is not dispositive of the voluntariness inquiry in any given case. U.S. v. Chan-Jimenez, 125 F.3d 1324, 1327 n. 3 (9th Cir. 1997). The five factors listed above are certainly not the only factors to be considered, as will be seen in the following discussion of factors. (See, Section 5(b) – (k) and Section 6 of this Course Outline.) The totality of circumstances inquiry is not limited

to a particular number of circumstances. Every case is different, and a particular case may present circumstances relevant to determining voluntariness that have rarely or never been considered by the courts. The following 9 specific factors are simply those factors which have frequently been considered. Following the discussion of these 9 factors will be a brief review of additional miscellaneous factors. (See, Section 5(k) of this Course Outline.)

b) Factor #1: The government's burden to show voluntariness cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

(i) Bumper v. North Carolina

In Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788 (1968), the Supreme Court said that verbal consent given only after the officer told the subject that the officer had a search warrant was not voluntary; rather, the subject did nothing more than acquiesce to a claim of authority. (In Bumper, the officer may or may not have had a search warrant. For reasons that are unimportant to an understanding of this case, the Court assumed that the officer did not have a search warrant.)

(ii) Claim of authority

If a person gives consent to search after being told by the officer that the officer has a search warrant, that the officer can search without a search warrant, or it has been conveyed to the person in some other way that the search will take place with or without the subject's consent,[10] the claim of authority will weigh very heavily against a judicial determination that the consent was voluntary. Orhorhaghe v. I.N.S., 38 F.3d 488 (9th Cir. 1994) (officers admitted they didn't have a search warrant, but claimed they didn't need one); Lightford v. State, 520 P.2d 955 (Nev. 1974) (Officers said, "We could kick the door in"); Hadley v. Williams, 368 F.3d 747 (7th Cir. 2004).

(iii) Consent given after commencement of search

Similarly, if officers begin searching and then ask for consent, a subject may reasonably feel that he or she can't refuse; consent given after a search has already commenced will likely be viewed as mere acquiescence to a claim of authority. Accordingly, consent to search given after a protective sweep may, depending on the totality of circumstances, be deemed involuntary. U.S. v. Furrow, 229 F.3d 805, 814 (9th Cir. 2000), rev'd on other grounds by U.S. v. Johnson, 256 F.3d 895 (9th Cir. 2001) ("a person might reasonably think that refusing to consent to a search of his home when he knows that the police have, in fact, already concluded a search of his home, would be a bit like closing the barn door after the horse is out").

(iv) No consent where police pound on door

Consent is not to be easily inferred. It bears repeating that it is the government's burden to prove voluntary consent by clear and persuasive evidence. The government's burden to show voluntariness cannot be discharged by showing no more than acquiescence to a claim of lawful authority. U.S. v. Perez-Lopez, 348 F.3d 839, 846 (9th Cir. 2003). Thus, if police officers pound on the door of a person's residence and demand that someone answer (that is, open) the door, the person answering the door has merely acquiesced to the officers' authority. When a person's act of opening the door is merely acquiescence to authority, anything the officer sees upon the opening of the door is the product of an unlawful search (assuming no probable cause). U.S. v. Winsor, 846 F.2d 1569 (9th Cir. 1988); U.S. v. Bautista, 362 F.3d 584 (9th Cir. 2004). On the other hand, where there is no demand (express or implied) to open the door, there is no Fourth Amendment problem. U.S. v. Cormier, supra, at 1109 (Officer knocked on the door for a short period of time, never announced that she was a police officer nor did she compel the defendant to

[10] Where officers actually have probable cause to search and therefore can obtain a warrant, the consent may be voluntary. See, Section 5(e) of this Course Outline.

open the door under the badge of authority. Because there was no police demand to open the door, and the officer was not unreasonably persistent in her attempt to gain access to the defendant's residence, once the defendant opened the door the encounter was consensual).

(v) Burden of showing voluntary consent heaviest when consent would be inferred to enter and search a home

Similarly, consent to enter the residence will not be easily inferred. Indeed, the burden of showing voluntary consent is the "heaviest when consent would be inferred to enter and search a home . . ." U.S. v. Shaibu, 920 F.2d 1423, 1426 (9th Cir. 1990). Thus, if a person answers the door, and simply steps back into his or her home leaving the door open, the officer cannot assume that he or she has the resident's consent to enter. "Stepping away from the doorway, without more, is not clear and persuasive evidence of consent." Howe v. State, 916 P.2d 153, 158 (Nev. 1996). Likewise, a resident's failure to object to an officer's entry into the home will more likely be viewed as acquiescence to authority than as evidence of consent. U.S. v. Shaibu, supra (holding that in the absence of a specific request to enter, a person's failure to object to the officers' entry is not sufficient to establish free and voluntary consent). However, stepping away from the door and failing to object to the officers' entry will be viewed as evidence of consent – not as acquiescence to authority - if followed by the officers' request for consent to enter. Holmes v. Kucynda, 321 F.3d 1069 (11th Cir. 2003).

(vi) Consent can be inferred where officers accommodating request made by subject

Officers don't need to specifically ask for consent to enter a home or any other place protected by the Fourth Amendment when their efforts to accommodate a subject's needs necessarily imply an invitation to enter. Thus, for example, in U.S. v. Rossi, 27 F.3d 409 (9th Cir. 1994), F.B.I. agents arrested Rossi for interstate transportation of stolen property outside of

a condominium in which Rossi and Susan Barber were residing. He asked the agents if he could change clothes. Rossi, who was handcuffed, provided agents with a key to open the condo. The agents and then Rossi entered the condo and Rossi changed his clothes. One agent was outside of the condo talking to Susan Barber, and either she or the F.B.I. agent suggested they go inside the condo. She got out of the F.B.I. car and entered the condo with the F.B.I agent. She was cooperative and, once inside, invited agents to "go ahead and look around." The court said that both entries (the entry by officers accompanying Rossi and the entry by the agent accompanying Barber) were lawful. See also, U.S. v. Gilbert, 774 F.2d 962 (9th Cir. 1985) (Defendant was arrested wearing only shorts and a tee shirt. She asked an officer to go to her home and get some clothing for her that she said could be found on her bed. The Ninth Circuit said the "[defendant's] request that the officers obtain her clothing necessarily implied consent to enter the bedroom in which she said the clothing was located"); U.S. v. Mejia, 953 F.2d 461 (9th Cir. 1991); Anderson v. State, 477 P.2d 595, 599 (Nev. 1970) (when officers opened canvas bag at defendant's request to get some cigarettes, they were entitled to seize any evidentiary items exposed to their view).

c) Factor #2: Display of weapons, and presence of a large number of officers are factors to be considered.

When assessing whether consent is voluntary, a court will consider whether an officer displays a weapon. The display of a weapon, all by itself, does not necessarily render consent involuntary, but it is an important factor to consider. U.S. v. Childs, 944 F.2d 491 (9th Cir. 1991). Even simply placing a hand on a holstered weapon could be considered a coercive factor. U.S. v. Chan-Jimenez, supra; Orhorhaghe v. I.N.S., supra (officer put his hand on his hip in order to reveal that he was carrying a gun).

Though not as significant as display of weapons, the presence of a large number of officers is another coercive factor, particularly if the presence of a large number of officers is not required under the circumstances.

d) Factor #3: Police custody is a factor to be considered.

Police custody (or just the threat of police custody - See, U.S. v. Soriano, 346 F.3d 963, opinion amended and superseded on denial of rehearing by 361 F.3d 494 (9th Cir. 2004)); U.S. v. Ocheltree, 622 F.2d 992, 994 (9th Cir. 1980)) - is an important consideration. Custody alone does not necessarily vitiate consent. U.S. v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976); U.S. v. Kaplan, 895 F.2d 618, 622 (9th Cir. 1990); U.S. v. Lindsey, 877 F.2d 777, 783 (9th Cir. 1989); Sparkman v. State, 590 P.2d 151,154 (Nev. 1979). However, if combined with other important factors (e.g., the display of weaponry, lack of Miranda warnings, lack of knowledge of right to withhold consent, or repeated requests for consent, etc.), police custody can vitiate consent.

While it is difficult, if not impossible, to set forth a black and white rule about under what circumstances an officer can get voluntary consent from a person in custody, certainly consent will be valid if custody is the only coercive factor that there is. Even if there are other coercive factors present, the coercive nature of custody can normally be diminished by taking any or all of the following steps:

- Tell the subject that he has the right to withhold consent. Better yet, get written consent. (See, Section 5(i) of this Course Outline.)
- Give Miranda warnings. (See, Section 5 (j) of this Course Outline.)
- If it wouldn't interfere with officer safety or any other legitimate law enforcement objective, take the cuffs off before asking for consent.

The following illustrative cases involved subjects in custody at the time consent was given:

- Consent was voluntary and/or not the fruit of an unlawful detention in the

following cases:

U.S. v. Torres-Sanchez, 83 F.3d 1123 (9th Cir. 1996)
Lawful traffic stop. The officer developed reasonable suspicion that the vehicle contained drugs. The officer asked for and obtained consent to search. Miranda warnings weren't given, but weren't necessary because the consenter wasn't under arrest at the time the consent was given. Consenter was never advised that he could withhold consent, and was never advised that a search warrant could be obtained. No guns were displayed, nor was there any other display of force.

Result: Consent was voluntary.

U.S. v. Kaplan, 895 F.2d 618 (9th Cir. 1990)
Defendant was arrested at his office after completing an unlawful drug transaction. The officer advised defendant of his Miranda rights, and asked about the marijuana. When defendant claimed he didn't know what the officer was talking about, the officer informed him that he could give his permission to search the desk, or he would have to wait to get a search warrant. The officer had probable cause to search. The officer explained that the defendant had the right to refuse permission. The defendant gave consent. Defendant was not a person lacking in education or understanding.

Result: Consent was voluntary.

U.S. v. Castillo, 866 F.2d 1071 (9th Cir. 1989)
Officers executed an arrest warrant in defendant's home. After doing a protective sweep, an officer obtained defendant's verbal consent. The officer's gun was holstered. Defendant was told he had a right to refuse to give consent, and if he chose not to, the officers would attempt to get a warrant. Defendant refused, however, to sign a written consent form.

Result: Consent was voluntary.

Sparkman v. State, 590 P.2d 151 (Nev. 1979)
After completing a drug transaction with defendant in defendant's home, the informant exited the house and gave a pre-arranged signal to police officers waiting outside. Uniformed officers, armed with shotguns, entered the house. One officer conducted a protective sweep. One officer patted down the defendant. A third officer arrested the defendant and gave him his Miranda warnings. Once it was determined that defendant was alone and unarmed, the officers returned their shotguns to their car. The officers asked for consent to search. Initially, defendant refused, but then agreed and signed a written consent form. Defendant was no stranger to the law, and knew he had the right to withhold consent. {Indeed, the Nevada Supreme Court had, a few years

previously, affirmed defendant's conviction for selling narcotics. Sparkman v. State, 504 P.2d 8 (Nev. 1972)}

Result: Consent was voluntary

- Consent was not voluntary and/or the fruit of an unlawful detention in the

following cases:

U.S. v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. 1997)

Officer pulled up behind vehicle which had pulled over on desert highway. Having no reasonable suspicion that defendant's vehicle contained drugs, and before returning the license and registration to the driver, the officer asked for consent to search.

The officer did not administer warnings and did not inform defendant of his right to refuse consent, and the officer kept his hand on his gun. Moreover, the incident took place on a desert highway, with nobody else in sight.

Result: Consent was not voluntary. Defendant merely acquiesced to officer's authority.

U.S. v. Chavez-Valenzuela, 268 F.3d 719 (9th Cir. 2001)
Started as a lawful traffic stop. Upon returning license and registration to the driver, the investigative detention should have ended. Having no reasonable suspicion that defendant's vehicle contained drugs, the officer asked for consent to search.

Evidence obtained subsequent to an illegal investigation is tainted by the illegality and thus inadmissible notwithstanding the suspect's consent, unless subsequent events have purged the taint.

Result: The consent was the fruit of an unlawful detention and questioning and did not validate the search.

U.S. v. Reilly, 224 F.3d 986 (9th Cir. 2000)
Officers executed an arrest warrant in defendant's home. Guns were drawn. After being asked his name, defendant said, "Well, aren't I allowed to see a lawyer?" Court said that the officers couldn't ask for consent to search after defendant had arguably requested the presence of an attorney.

Result: Defendant's constitutional rights violated.

U.S. v. Reid, 226 F.3d 1020 (9th Cir. 2000)
Without a warrant, officers went to defendant's home. As the officers began talking to defendant at the front door, defendant slammed and locked the door, and ran out the back door. He was apprehended there by another officer and was made to spread eagle, frisked, and then handcuffed. There was no probable cause to arrest. Officers neither read defendant his Miranda rights nor informed him that he had the right not to consent to the search. The officers told him he was "going to prison." One officer had his gun drawn. Consent given to search home.

Result: Consent was involuntary.

Lightford v. State, 520 P.2d 955 (Nev. 1974)
Officers had an arrest warrant for defendant, saw him driving, pulled him over, and arrested him. They gave him the Miranda warnings. They performed a search incident to arrest and found drugs on his person. They asked for consent to search his home. In doing so, the officers suggested the possibility of kicking defendant's door if the door key was refused. Defendant gave the officers the door key and verbally consented to a search of his home.

Result: Consent was involuntary.

e) Factor #4: Threat to seek or obtain a search warrant is a factor to be considered.

The law with regard to threatening to seek or obtain a warrant was recently summarized by the Nevada Supreme Court in McMorran v. State, 46 P.3d 81, 84 (Nev. 2002)[11] as follows:

- "Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant.
- But when the expressed intention to obtain a warrant is genuine...and not merely a pretext to induce submission, it does not vitiate consent.
- However, intimating that a search warrant will automatically issue is inherently coercive." (internal footnotes and punctuation omitted)

There are a couple more principles to bear in mind. First, regardless of whether the officer has probable cause to obtain a warrant, he should never threaten to obtain a warrant in a threatening manner. U.S. v. Cormier, supra, at 1112 (9th Cir. 2000). Second, regardless of

[11] In McMorran v. State, after lawfully entering defendant's home, officers advised that they were freezing the premises and seeking a warrant. The defendant consented to a search. The Court determined that the consent was involuntary because (1) the officers said they were freezing the premises pending a determination on the warrant, and (2) there were no grounds for a premise freeze.

whether the officer has probable cause, it is better for the officer to say that he is going to "seek" or "apply for" a warrant than to say that he will "obtain" a warrant. See, McMorran v. State, supra ("The words 'would obtain' [a search warrant] . . . improperly implied that a search warrant would automatically issue . . .")

f) Factor #5: Prior illegal police action is a factor to be considered in determining voluntariness. Alternatively, consent given after illegal police action may be analyzed under the "fruit of the poisonous tree" doctrine.

If a person gives consent to search after police have engaged in an unlawful act, there are two alternative ways to look at why the evidence obtained during the search may be suppressed. First, the evidence is "fruit of the poisonous tree." Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407 (1963); U.S. v. Taheri, 648 F.2d 598 (9th Cir. 1981); Arterburn v. State, 901 P.2d 668 (Nev. 1995). This is the more typical approach. Second, the evidence may be suppressed because the prior illegal act is a coercive factor and, depending on all of the circumstances, the consent may therefore be involuntary. U.S. v. Chan-Jimenez, supra, at 1326-28. Either way the evidence might be suppressed.

Consent given after an illegal police action is normally, but not always, involuntary and/or "fruit of the poisonous tree." In looking at voluntariness, one must consider the totality of circumstances to determine whether the consent was coerced; and, in looking at "fruit of the poisonous tree," one must consider whether the taint of the illegal police action has been purged. In either case, the inquiry focuses on whether the giving of consent was an act of free will as opposed to the result of coercion or the exploitation of the illegality. In determining voluntariness, the focus is on all of the factors discussed in Sections 5 and 6 of this Course Outline. In determining whether the taint has been purged, a court will look at the amount of time between the illegality and consent and what happened during that time, and will also take

into account the police officer's purpose for his illegal action and whether or not he acted flagrantly. U.S. v. Crawford, 323 F.3d 700, 719 (9th Cir. 2003), U.S. Millan, 36 F.3d 886, 890 (9th Cir. 1994); U.S. v. George, 883 F.2d 1407, 1416 (9th Cir. 1989) (finding consent ineffective when given one hour after illegal arrest, no intervening circumstances, and flagrant police misconduct); U.S. v. Furrow, supra, at 814 (if consenter unaware of the illegal entry, his ability to consent would be unimpaired, and the taint would be effectively purged); U.S. v. Jones, 286 F.3d 1146, 1152-53 (9th Cir. 2002); U.S. v. Suarez, 902 F.2d 1466, 1468 (9th Cir. 1990) (unjustified warrantless search of apartment unconstitutionally tainted drug defendant's subsequent consent to search); U.S. v. Hotal, 143 F.3d 1223, 1228 (9th Cir. 1998) (same).

Whether looking at voluntariness of consent, or at whether the taint has been purged, the inquiry is similar. However, while involuntary consent cannot be purged of the taint of prior illegal police action, a court may conclude that even a voluntary consent is not purged of the taint of prior illegal police action. U.S. v.Taheri, supra; U.S. v. Oaxaca, 233 F.3d 1154, 1158 (9th Cir. 2000).

g) Factor #6: Personal characteristics/condition. Level of maturity, education; experience with police; level of ability to speak English; degree of professionalism involved in employment; emotional state (e.g., nervousness, upset); mental state (e.g., mental problems); subject in pain; sobriety; or age are factors to be considered.

(i) Juveniles

Courts are particularly careful assessing whether a juvenile's consent is truly voluntary. There is a recognition that juveniles are more likely to feel powerless to decline a request for consent made by a police officer. Accordingly, the government's burden to prove voluntary consent is heavier when it comes to proving that a juvenile consented.

While consent given by an adult can be voluntary even if he is never advised that he has the right to refuse consent, the failure to advise a juvenile of the right to refuse consent takes on a much more coercive tone. When seeking consent to search from juveniles, officers are encouraged to (1) advise them of their right to refuse to consent, and (2) use age-appropriate language when doing so.[12]

(ii) Ability to speak English

The government's burden to prove voluntary consent is also heavier when it comes to proving that a person who has a poor command of English consented. In Alejandre v. State, 903 P.2d 794 (Nev. 1995), the Nevada Supreme Court said that the written consent given by a person who didn't speak English wasn't voluntary where the officer's ability to speak Spanish was based on a 40-hour course and the officer wasn't able to translate the consent form.

(iii) Emotionally distraught and/or intoxication and/or low intelligence

While a person's emotional condition, and/or intoxication, and/or level of intelligence are factors, they're generally looked at differently than juvenile status (See Section 5(g)(i) of this Course Outline) and relatively poor command of English (See Section 5(g)(ii) of this Course Outline). With the two latter factors, the courts say that the government has a heavier burden of proving voluntariness. For emotional upset, intoxication, and low intelligence to render consent involuntary, the courts say that they must be "so profound as to impair [the defendant's] capacity for self-determination or understanding of what the police were seeking." U.S. v. Duran, 957 F.2d 499 (7th Cir. 1992). Thus, just because a person is too drunk to drive doesn't mean he is too drunk to give voluntary consent.[13]

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[12] And, of course, always get written consent whenever possible (not just when dealing with a juvenile).

[13] In State v. Melton, 478 N.W.2d 341 (Neb. 1992), voluntary consent was given by a person whose blood alcohol level was .16. See also, State v. Edwards, 434 So.2d 395 (La. 1983) (.20). If a person is alert enough to give officers information or the wherewithal to concoct lies, the person probably has the capacity to give voluntary

Similarly, a person can give voluntary consent when he is nervous, agitated, or upset. As long as the person has the capacity to consent, the consent is voluntary (assuming there aren't other factors which would make the consent involuntary).

A person suffering in pain can give voluntary consent. Again, as long as it's not so "profound as to impair his capacity for self-determination or understanding of what the police are seeking" the consent can be voluntary. U.S. v. George, supra (After officer shot defendant in the arm, defendant was taken to the hospital and treated. Doctors working in the emergency room performed a brief neurological exam, determining that defendant was oriented and aware of the situation, and that he was speaking and responding appropriately. Shortly after that another officer advised him of his rights and obtained defendant's oral and written consent to search. Because of his injuries, defendant's written signature was made by placing an "x" on the consent form with his nonwriting, good arm).

The same holds true for people who are of low intelligence. However, if the officer is aware of the person's mental slowness or mental problems and tries to exploit it, a court may view such exploitation as particularly coercive.

All of these personal characteristics or conditions are factors. If any of these factors are present, an officer is best advised to advise the subject that he has the right to refuse to give consent. (And better yet, get written consent.)

(iv) Person's higher level of education; experience with the law; position

The higher a person's level of education, experience with the law or police, or position, the more likely the person's consent is voluntary. U.S. v. Tolias, 548 F.2d 277 (9th Cir. 1977) (coercive setting may be mitigated by a showing that the consenter had high intelligence). And

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consent. U.S. v. Koshnevis, 970 F.2d 691 (9th Cir. 1992); U.S. v. Nicholson, 942 F.2d 795 (unreported) (9th Cir. 1991).

vice versa. La Duke v. Nelson, 762 F.2d 1318 (9th Cir. 1985) (vulnerable nature of migrant workers made them particularly susceptible to a strong show of force by INS agents; consent involuntary). In evaluating consent, courts will take into consideration factors like that a person went to college, that the person is an attorney or a doctor, or that a person owns a business (U.S. v. Wasserteil, 641 F.2d 704, 707 (9th Cir. 1981); State v. O'Looney, 544 F.2d 385, 388 (9th Cir.) cert. denied, 429 U.S. 1023, 97 S.Ct. 642 (1976)), or that person is a convict or has otherwise had lots of trouble with the police. Sparkman v. State, supra; U.S. v. Cormier, supra, at 1113 (9th Cir. 2000) (defendant had a "very long, detailed, and thorough experience with law enforcement" which "increase[d] the likelihood that [defendant] was already aware of his rights to refuse consent...").

h) Factor #7: Prior or subsequent refusal to give consent is a factor to be considered.

Repeatedly requesting consent is a factor to consider in determining whether consent is voluntary. U.S. v. Raibley, 243 F.3d 1069, 1075-76 (7th Cir. 2001); State v. O'Neill, 148 Wash. 2d 564, 62 P.3d 489, 504 (2003). Once a subject refuses to give consent, further requests for consent take on a coercive tone.

While a subject's refusal to sign a written consent form after allegedly giving verbal consent casts doubt on whether the subject really had in fact initially given verbal consent and is otherwise a factor in determining whether the verbal consent was given voluntarily, the subsequent refusal to sign the written consent form certainly does not revoke the earlier verbal consent. U.S. v. Castillo, supra. Officers should appreciate, however, that while they may legally search pursuant to verbal consent even if the subject later refuses to sign a written consent form, doing so may not be advisable. If a court later determines that the prosecutor did not prove by clear and persuasive evidence that the verbal consent was given at all, or, if so, that the

consent was given voluntarily, anything found during the consent search will be suppressed. As long as officers have probable cause, it may be better to seek a search warrant than to risk the possibility of suppression and/or a lawsuit.

i) Factor #8: The subject's knowledge of his right to refuse to give consent is a factor to be taken into account. It is an important factor which can counteract the existence of coercive factors.

While consent can be voluntary even when the officer doesn't advise the subject of his right to refuse consent, the consent might be rendered involuntary if the failure to advise of the right to refuse consent is combined with other coercive factors. U.S. v. Kim, 25 F.3d 1426, 1432 (9th Cir. 1994) (Where failure to inform a person of his right to withhold consent was the only coercive factor, consent to search was voluntary). Advising a person that he can withhold consent goes a long way to mitigating the impact of other coercive factors. Sparkman v. State, supra; U.S. v. Wasserteil, supra, at 707. And, as has been stated previously, it is always preferable to have the consenter's signature on a written consent form.

j) Factor #9: While Miranda warnings is a factor to be taken into account, its significance is (rightfully) being diminished by the courts. Nonetheless, the giving of Miranda warnings to a person in custody is a factor which can counteract the existence of some coercive factors.

By asking for consent to search, an officer does not reasonably expect an incriminating response. (While the search may lead to the discovery of incriminating evidence, the response – i.e., "yes" or "no" – to a request to search is not itself an incriminating response.) However, despite the fact asking a person in custody for consent to search does not constitute "custodial interrogation" for purposes of Miranda, nevertheless the courts have determined that the giving of Miranda warnings to a person in custody is a factor in determining whether consent is voluntary. This is curious given that the Miranda warnings do not say anything about the right to

withhold consent to search.[14] Thus, officers should be aware that they should give Miranda warnings to a person who is under arrest before[15] asking the arrestee for consent to search. While the failure to do so does not necessarily render the arrestee's consent involuntary, it would be deemed a factor in determining whether the consent was free from coercion. On the other hand, the giving of Miranda warnings to a person who is under arrest will go a long way toward mitigating the presence of any other coercive factors which may be present.

If a person is detained – even if he's not under arrest – the lack of Miranda warnings before obtaining consent is a coercive factor if the detention is unlawful. U.S. v. Chan-Jimenez, supra.

If a person is in custody and is given his Miranda warnings and asks to speak to an attorney or even implies that he wants to do so, or claims he has the right to speak to an attorney, the officer should not ask for consent to search. U.S. v. Reilly, 224 F.3d 986, 994 (9th Cir. 2000).

While the lack of Miranda warnings has always been considered an important factor, a recent Ninth Circuit case questioned whether it really should be regarded as important. In U.S. v. Perez-Lopez, supra, at 846 (9th Cir. 2003), the Ninth Circuit analyzed its prior decisions interpreting the relevance of Miranda warnings to determining the voluntariness of consent and openly questioned whether Miranda warnings really ought to be given the significance they've been given: "It is open to question . . . whether the inclusion or exclusion of Miranda warnings in a given set of circumstances should weigh much in either direction in considering voluntariness." id. While the relevance of Miranda may be at a crossroads in the law, for the

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[14] "Miranda warnings do not in terms address the right to refuse to agree to search but rather focus on involuntary incriminating statements." U.S. v. Perez-Lopez, supra, at 846 (9th Cir. 2003).

[15] "When a Miranda warning follows rather than precedes the purported consent, it cannot support the voluntariness of the consent." U.S. v. Perez-Lopez, supra, at 847 (9th Cir. 2003).

time being officers ought to be giving Miranda warnings to an arrestee before asking for consent to search to mitigate any coercive factors which may be present.

k) Miscellaneous factors.

Voluntariness is "based on the totality of circumstances surrounding the giving of consent." U.S. v. Alfonso, 759 F.2d 728, 740 (9th Cir. 1985). The nine factors discussed above are not the only factors to be considered. Officers should take into account any factor which might reasonably affect a determination of voluntariness. Some additional miscellaneous factors include, but are not limited to, the following:

- Finding of voluntariness is more likely if officer's demeanor and tone are calm and not threatening. U.S. v. Kim, supra, at 1432 (9th Cir. 1994).

- Officers wearing plain clothes are not as intimidating as uniformed officers. id.

- Being asked for consent in broad daylight is not as intimidating as being asked for consent at night. id; U.S. v. Page, 302 F.2d 81 (9th Cir. 1962)

- Being asked for consent on a public street in the presence of watchful observers potentially sympathetic to the consenter militates against a finding of involuntariness. U.S. v. Kim, supra, at 1432; U.S. v. Perez, 644 F.2d 1299 (9th Cir. 1981). Conversely, being asked for consent while in a remote place with no one in sight tends to be coercive. U.S. v. Chan-Jimenez, supra; c.f., U.S. v. Drayton, supra ("Indeed, because many [people] are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police...than in other circumstances"); Orhorhaghe v. I.N.S., supra (defendant detained in interior hallway of apartment building, a nonpublic setting).

- An indication that the consenter believed it was advantageous for him to consent helps to establish voluntariness. U.S. v. Kim, supra, at 1432, n. 4; U.S. v. Soriano, supra (An example of such an indication would be where the consenter is not the suspect or otherwise wants to show his noninvolvement.)

- A consent given after a confession is more likely to be voluntary. U.S. v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973). This tends to show that the consenter is cooperating and not being coerced.

- Cooperative behavior tends to show voluntariness. U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980); U.S. v. Judge, 501 F.2d 1348 (9th Cir. 1974); U.S. v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978). (An example would be where the consenter

actually assists in the search by personally unlocking the container to be searched or handing the keys to the officer.)

- Issuing threats is coercive. U.S. v. Reid, supra (threatening defendant that he is going to prison.)
- Finally, note that a significant amount of time or other intervening circumstances between the coercive factor(s) and the consent can militate in favor of voluntariness. U.S. v. Patayan Soriano, supra; U.S. v. Childs, supra; Sparkman v. State, supra; U.S. v. Kelley, 953 F.2d 562 (9th Cir. 1992).

6. Deceit.

While cases sometimes refer to deceit as a factor in determining the voluntariness of consent, deceit is better understood as a distinct area of the law with its own special considerations. In terms of determining voluntariness of consent to search, the critical distinction to make is between deceit as to identity and deceit as to purpose. That distinction will be discussed in Sections 6(a) and 6 (b) below.

Inevitably an examination of deceit in the context of voluntary consent to search spills over into deceit in other contexts, such as deceit used to gain entry into a dwelling when executing a warrant, and whether deceit used to get a suspect to open his door dispenses with the knock and announce requirement. Those issues will be explored in Section 6(c) below.

The discussion of those issues, in turn, is inextricably linked to deceit used to get a suspect to leave his dwelling in order that he may be arrested. That issue is explored in Section 6(d) below.

a) Consent to a warrantless entry is valid regardless of the fact that the law enforcement officer hid or lied about his true identity. (See graph on p. 148.)

In a series of decisions by the U.S. Supreme Court,[16] it is clear that when an individual gives consent to another to enter, the consent is not rendered invalid merely because it would not

[16] On Lee v. U.S., 343 U.S. 747, 72 S.Ct. 967 (1952); Hoffa v. U.S., 385 U.S. 293, 87 S.Ct. 408 (1966) (In Hoffa, the Supreme Court upheld the propriety of the planting of a government informer in a suspect's hotel room); Lewis

have been given but for the concealment or affirmative misrepresentation which made the consenting party unaware of the other person's identity as a police officer or agent. Jones v. Berry, 722 F.2d 443 (9th Cir. 1983) (IRS agent posed as prospective purchaser of small business to persuade seller to expose illegal "skimming" activities); U.S. v. May, 52 F.3d 335 (unreported) (9th Cir. 1995) (officers didn't identify themselves as officers when the hotel manager, accompanied by the officers, knocked on the defendant's hotel room door and announced "room service." The officer wanted defendant to come to the door so that they could speak to him about his possible involvement in drug activity. Because the defendant wasn't informed that the people seeking entry were government agents, his misrepresentation argument was unavailing); U.S. v. Couch, 985 F.2d 575 (unreported) (9th Cir. 1993) (Court approved use of a ruse by police to gain entrance into his home – by pretending to be lost partygoers who needed to borrow the telephone). In other words, as the Nevada Supreme Court, citing to a decision by the Ninth Circuit, put it:

> "[A]n officer may legitimately obtain an invitation into a house by misrepresenting his identity...If he is invited inside, he does not need probable cause to enter, he does not need a warrant, and, quite obviously, he does not need to announce his authority and purpose." U.S. v. Glassel, 488 F.2d 143, 145 (9th Cir. 1973), cert. denied, 416 U.S. 941, 94 S.Ct. 1945 (1974), cited in Creps v. State, 581 P.2d 842, 844 (Nev. 1978) (undercover officer posed as willing buyer to gain consensual entry into a home to purchase drugs).

The undercover entry must be limited to the purposes contemplated by the suspect. Once inside the suspect's home, the agent may not "conduct a general search for incriminating materials," but he or she may seize any contraband in plain view. Lewis v. U.S., supra. See

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v. U.S., 385 U.S. 206, 87 S.Ct. 424 (1966) (In Lewis, the Supreme Court said that a government agent may properly pose as a willing buyer to gain consensual entry into a private home to purchase narcotics, and thereafter use the purchase as evidence against the seller.) The Court said that by engaging in illegal narcotics activities, the Defendant, in effect, converted his home ". . . into a commercial center" and that "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant." 385 U.S., at 211, 87 S.Ct., at 427.

also, U.S. v. Glassel, supra; U.S. v. Garcia, 997 F.2d 1273 (9th Cir. 1993); U.S. v. Miller, 688 F.2d 652, 658-59 (9th Cir. 1982).

(i) Consent once removed

Where an undercover agent is invited into a home, establishes the existence of probable cause to arrest or search, and immediately summons help from other officers, the warrantless entry of the other officers does not violate the Fourth Amendment. U.S. v. Bramble, 894 F. Supp. 1384, 1393 (D. Hawaii 1995), aff'd., 103 F.3d 1475, 1478-79 (9th Cir. 1997). The additional backup officers are restricted to the scope of the consent originally given. (If the undercover officer already has probable cause to search or arrest before obtaining consent to enter, he should first obtain a warrant.)

(ii) Officers may affirmatively deny that they are officers

The Ninth Circuit has rejected the argument that a homeowner may validly condition his consent to entry on the strangers' not being law enforcement officers. U.S. v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984) (court observed that imposing an affirmative duty on officers to identify themselves whenever questioned would effectively end undercover operations). Thus, where a homeowner says, "you can come in if, and only if, you aren't a police officer," and the undercover officer assures the homeowner that he is not an officer, the consent to enter is not any the less voluntary. U.S. v. Bramble, supra.

b) Where an officer doesn't conceal or misrepresent his identity, consent to a warrantless entry is not valid if the consenter was deceived as to the purpose of intruding into an area otherwise protected by the Fourth Amendment.

If an officer doesn't conceal or misrepresent his identity, but instead lies about the purpose for which he wishes to enter a suspect's home without a warrant, the consent is not valid. Suppose, for example, an officer, lacking a warrant, knocks on the suspect's door,

identifies himself as an officer, and explains that he would like permission to enter in order to investigate a robbery. In truth, the officer is not investigating a robbery. If the suspect permits the officer's entry, the entry would be unlawful. A warrantless ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent. U.S. v. Phillips, 497 F.2d 1131, 1135 n. 4 (9th Cir. 1974).

Suppose a business license agent is inspecting a home with the homeowner's consent as a part of the homeowner's pending business license application. A plain clothed police officer accompanies the business license agent because he wishes to prepare a diagram of the home in preparation for obtaining and executing a search warrant. The business license agent identifies himself to the homeowner as a business license agent and explains that the officer "is with me." The officer doesn't say anything. The homeowner allows the inspection to proceed. The consent is not valid. The officer's silence in the face of being identified as "with [the business license agent]" amounted to a deliberate misrepresentation that his true purpose was that announced by the business license agent. U.S. v. Bosse, 898 F.2d 113 (9th Cir. 1990). If the circumstances had been different, and the impression hadn't been created that the officer's purpose was to inspect the home as a part of the homeowner's pending business license application (which was not, in fact, his purpose) and the plain clothed officer had merely concealed his identity, the officer's entry might have been valid. U.S. v. Allen, 997 F.2d 1373, 1382 (9th Cir. 1980) cert. denied, 454 U.S. 833, 102 S.Ct. 133 (1981) (Entry onto defendant's ranch by customs officer while accompanying Bureau of Land Management officers was unobjectionable where the BLM officers had a right to enter to discuss certain matters. Customs officer did not violate the Fourth Amendment by concealing his identity as customs bureau

official; when property owner asked to see their identification, the BLM officials produced theirs, but the customs officer, not wanting to reveal his identity as a customs official, said his was at home);[17] State v. Bunce, 669 N.W. 2d 394 (Minn. 2003).

One consequence of the rule that a police officer cannot make a warrantless entry by misrepresenting the scope or purpose of his actions is that the officer can't come to a defendant's home without an arrest warrant and, intending to make an arrest, use a ruse to gain entry. U.S. v. Briley, 726 F.2d 1301, 1304 (8th Cir. 1984). Accordingly, an officer cannot lawfully obtain consent by falsely promising or otherwise misrepresenting that he will not make an arrest. Thus, in State v. McCrorey, 851 P.2d 1234 (Wash. App. 1993), relying on U.S. v. Bosse, supra, the court held that a police officer's entry into a person's home was not valid where the person told the officer that the officer could only come in if he wouldn't arrest the occupant (even if the officer didn't make such an explicit promise, the promise could be inferred where the officer said "Well, let me just come in and we'll talk about it"), and then, once inside, the officer arrested the occupant. The Washington court said:

> "We find the Ninth Circuit's approach in United States v. Bosse, 898 F.2d 113 (9th Cir.1990) persuasive. A government agent who gains entry by misrepresenting the scope or purpose of the investigation raises special policy considerations. It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given." 851 P.2d at 1240.

Where the occupant doesn't tell the officer that he can only come in if he doesn't make an arrest (as in State v. McCrorey, supra), the promise not to arrest isn't inferred by an officer's representation that he wants to come inside to talk where the circumstances do not otherwise infer a promise not to arrest (e.g., there has been no discussion about making or not making an

[17] See footnote 32, infra.

arrest). In other words, a request to come inside to talk when the real purpose is to arrest isn't a ruse. Schaeffers v. Wright, 46 F.3d 1145 (unreported) (9th Cir.), aff'd., 46 F.3d 1141, cert. denied, 515 U.S. 1122, 115 S.Ct. 2277 (1995); People v. Arias, 535 N.E.2d 89 (Ill. 1989); Alvarez v. Montgomery County, Md., 963 F.Supp. 495 (D. Md. 1997); Vizbaras v. Priebar, 761 F.2d 1013 (4th Cir. 1985); U.S. v. Briley, 726 F.2d 1301, 1304 – 1305 (8th Cir. 1984).[18]

Another necessary consequence of the rule that a police officer cannot make a warrantless entry by misrepresenting the scope or purpose of his actions is that an officer can't obtain consent by falsely promising leniency. State v. Howard, 509 N.W. 2d 764, 767 (Iowa 1993) (Officer said no one was in trouble, that he only intended to recover the stolen property).

c) Deception is no problem when officers are executing a warrant; knock and announce requirement is not triggered where there is no "break."

When an officer has a warrant, he may use a ruse to bring the defendant to the door. U.S. v. Michaud, 268 F.3d 728 (9th Cir.), cert. denied, 537 U.S. 867, 123 S.Ct. 271 (2002) (ruse by agent to persuade defendant to open the door of her hotel room, i.e., posing as the hotel's assistant manager and stating that the defendant's boyfriend was sick and needed her assistance, did not violate defendant's Fourth Amendment rights, given the existence of a valid warrant for her arrest).[19] As the Ninth Circuit succinctly stated, "There is no constitutional mandate

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[18] If an officer has probable cause to arrest, and obtains proper consent to enter without using a ruse, the officer may make a warrantless arrest. Bryant v. U.S. Treasury Dep't., Secret Serv., 903 F.2d 717, 723 (9th Cir), rev'd on other grounds, 502 U.S. 224, 112 S.Ct. 534 (1991); Ponce v. Craven, 409 F.2d 621, 626 (9th Cir. 1969); Tabb v. Ylst, 900 F.2d 263 (unreported) (9th Cir. 1990), Schaefers v. Wright, supra; Frisch v. Printz, 4 Fed. Appx. 533 (9th Cir. 2001) (unreported); U.S v. Hampton, 260 F.3d 832, 835 (8th Cir.), cert. denied, 535 U.S. 1058, 122 S.Ct. 1919 (2002). Though consent to entry permits an officer with probable cause to make a warrantless arrest, officers are advised that they should normally secure an arrest warrant in advance so that they are not dependent upon obtaining consent to enter. After all, things don't always go as planned.

[19] A defendant can be arrested in the threshold of his home without an arrest warrant after opening his door from within to answer a knock at the door if he voluntarily exposes himself to a warrantless arrest. U.S. v. VanEaton, 49 F.3d 1423 (9th Cir. 1995). A five-part test for determining whether a defendant voluntarily exposes himself to a warrantless arrest can be distilled from the caselaw as follows:

1) The officer can't use tricks, threats, or coercion to get the defendant to open his door. U.S. v. Johnson, 626 F.2d 753 (9th Cir. 1980), cert. granted, 454 U.S. 814, 102 S.Ct. 89 (1981), aff'd. on other grounds, 457 U.S. 537, 102 S.Ct. 2579 (1982).

forbidding the use of deception in executing a valid arrest warrant." Leahy v. U.S., 272 F.2d 487, 490 (9th Cir.), cert. granted, 363 U.S. 810, 80 S.Ct. 1246, cert. dismissed, 364 U.S. 945, 81 S.Ct. 465 (1960).

A ruse which brings the defendant to the doorway, outside his residence, or which causes the defendant to permit the officers' entry into his residence, does not violate the knock and announce requirement because the door is opened without any "breaking."[20] In other words, when a person is deceived into opening his door by officers possessing a warrant, there is no need to "break" and therefore no need to knock and announce. Dickey v. U.S., 332 F.2d 773, 778 (9th Cir.), cert. denied, 379 U.S. 948, 85 S.Ct. 444 (1964); Leahy v. U.S., supra, at 489

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2) The officer must announce his intention to arrest before crossing the threshold. U.S. v. Van Eaton, supra.
3) The defendant must not manifest that he is not voluntarily submitting to arrest. For example, upon hearing that he is under arrest, the defendant doesn't try to shut the door or retreat. U.S. v. Berkowitz, 927 F.2d 1376 (7th Cir. 1991) (defendant must acquiesce to arrest in doorway).
4) The officer must have probable cause to arrest.
5) If the defendant only partially opens the door and only partially exposes his body to public view, he is not in a public place and cannot be arrested in the doorway. Edwards v. State, supra.

[20] The knock and announce requirement for executing a search warrant is set forth in NRS 179.055, and provides as follows:

179.055. Officer may break door to serve warrant after admittance refused; breaking of door or window to liberate officer or person acting in aid of officer; use of reasonable and necessary force

1. The officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.
2. The officer may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of his warrant, is detained therein, or when necessary for his own liberation.
3. All reasonable and necessary force may be used to effect an entry into any building or property or part thereof to execute a search warrant. In the execution of the warrant, the person executing it may reasonably detain and search any person in the place at the time in order to protect himself from attack or to prevent destruction, disposal or concealment of any instruments, articles or things particularly described in the warrant.

The knock and announce requirement for execution of an arrest warrant is set forth in NRS 171.138 as follows:

171.138 Breaking open door or window: Making arrest. To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open a door or window of the house, structure or other place of concealment in which the person to be arrested is, or in which there is reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

(Okay for officers, who had an arrest warrant for defendant, to falsely claim they were from the County Assessor's Office, and then, once inside, place the defendant under arrest).

Until U.S. v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1999), no Ninth Circuit case had addressed the question of whether the use of force after achieving, by means of deception, a voluntary partial opening of a door, triggered the knock and announce requirement. In Contreras-Ceballos, id., the Ninth Circuit held that it did not, saying, "To rule otherwise would dictate a nonsensical procedure in which the officers, after having employed a permissible ruse to cause the door to be opened, must permit it to be shut by the occupants so that the officers could then knock, reannounce, and open the door forcibly if refused admittance." id. at 435 (holding that an officer was justified in claiming to be a Federal Express agent when executing a warrant; when suspect started to close door, officers announced their identity, authority and purpose and entered using force.)[21]

The use of a ruse to execute a warrant is normally employed because officers anticipate some serious problem, the destruction of property, or other danger in obtaining entrance to the premises. Courts have condoned all sorts of ruses used during the execution of a warrant. A ruse helps to reduce the likelihood of such problem, destruction of property, or danger. For example, in Coleman v. U.S., 728 A.2d 1230 (D.C.), cert. denied, 528 U.S. 909, 120 S.Ct. 256 (1999), the court discussed and distinguished several Ninth Circuit cases,[22] and held that entry into defendant's house by officers with a valid search warrant by use of a ruse about a burglary call on defendant's elderly, invalid mother, did not violate local and federal knock and announce

[21] As will be seen, infra, there is an open question as to the full ramifications of the Court's statement in U.S. v. Contreras-Ceballos that the knock and announce requirement wasn't even implicated.

[22] U.S. v. Phillips, supra; U.S. v. Glassel, supra; U.S. v. Contreras-Ceballos, supra; Dickey v. U.S., supra; Leahy v. U.S., supra.

statutes.[23] If officers executing an arrest warrant use a lure to make entry they should articulate in their reports the concerns they had about potential problems, destruction of property, or violence.

There is one final point to review with respect to the knock and announce requirement, a point which requires re-visiting U.S. v. Contreras-Ceballos, supra. In that case, the officers used a ruse as to identity to obtain a partial opening of the door. Once the defendant realized that the people at his door were officers, he tried to shut the door, at which time the officers announced their identity, authority, and purpose and used force to enter. There is an interesting question (which will no doubt be resolved by the courts in the future) as to whether the result would have been the same in U.S. v. Contreras-Ceballos, supra, even if the officers hadn't announced as they entered.

d) The law with respect to the use of deceit by officers to lure a suspect from his home (or other constitutionally protected area) so that a warrantless arrest can be made in a public place is undeveloped in Nevada and the Ninth Circuit.

As stated previously, an officer cannot use a ruse to make a warrantless entry in order to effectuate an arrest. There are apparently no cases by the U.S. Supreme Court, the Nevada Supreme Court or the Ninth Circuit addressing the ability of officers, by the use of deceit as to purpose, to lure a defendant outside in order to make a warrantless arrest in a public place.

It would seem that the better view is that deceit to lure a person outside in order to effectuate an arrest is not objectionable.[24] In Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371

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[23] See also, People v. Sunday, 441 N.E. 2d 374, 75-78 (Ill. 1982) (Entry by officers, possessing a warrant, telling occupants of home that their van outside had been broken into); State v. Mastracchio, 721 A.2d 844 (R.I. 1998) (plain clothes officer, possessing a warrant, knocked on defendant's door, claiming that she might have hit defendant's car in the parking lot); State v. Herstone, 633 So.2d 110 (Fla. 1994) (Entry by officers, possessing a warrant, asking defendant to come outside to identify a drunken friend); People v. Witherspoon, 576 N.E. 2d 1030 (Ill. 1991) (Entry by officers, possessing a warrant, made easier by luring defendant out of premises by setting off his car alarm); U.S. v. Syler, 430 F.2d 68, 70 (7th Cir. 1970) (With a valid arrest warrant, a federal agent posed as a "gas man" in order to induce the defendant to open her door).

(1980), the Supreme Court said that a warrant is needed to make a nonconsensual entry into a defendant's home to make a warrantless arrest. The purpose of the warrant requirement is to protect the "privacy and the sanctity of the home." Id. at 588, 100 S.Ct. at 1381. Luring a person outside of his home requires no unauthorized entry and does not violate the privacy and sanctity of the home and should therefore not be considered a violation of Payton. Thus, courts in other jurisdictions have generally condoned ruses which lure suspects out of their homes. People v. Moore, 434 N.E. 2d 300 (Ill. 1982); U.S. v. Vasiliavitchious, 919 F.Supp. 1113 (N.D. Ill. 1996), reconsideration denied, 924 F.Supp. 892 (1996); Alvarez v. Montgomery County, Md., 963 F. Supp. 495 (D.Md. 1997), aff'd., 147 F.3d 354 (4th Cir. 1998).

Given the Ninth Circuit's expressed concerns about people needing to be able to trust known law enforcement officials (U.S. v. Bosse, supra), or its holding in U.S. v. Johnson, supra (affirmative deception in obtaining defendant's presence in the doorway was improper),[25] or the Nevada Supreme Court's frequent departures from federal search and seizure jurisprudence,[26] it is truly difficult to know for an absolute certainty how the Ninth Circuit or the Nevada Supreme Court may feel about deceit used to lure a suspect from his home so that a warrantless arrest can be made in a public place. Some courts, in fact, have invalidated certain types of deceitful lures. People v. Reeves, 61 Cal. 2d 268, 38 Cal. Rptr. 1, 391 P.2d 393 (1964) (Officers had a hotel manager falsely tell a guest there was a registered letter for him at the front desk. This induced the guest to leave his room, allowing the officers to observe marijuana inside when he opened

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[24] Just because this may be the better view does not mean, as will be discussed below, that it is the law in our jurisdiction.

[25] This decision has been rightly criticized by Professor LaFave as being "directly contrary to a substantial body of Supreme Court and lower court authority on the matter of effectiveness of consent notwithstanding misrepresentation of identity..." 3 LaFave, Search and Seizure, A Treatise on the Fourth Amendment (3d ed. 1996) § 6.1(e), p. 259. See also, footnote 19, supra.

[26] See footnote 6, supra.

the door. The California Supreme Court held that the subterfuge rendered the ensuing search and seizure invalid);[27] Re. T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970).

It would seem that in most cases, officers can easily, and therefore should, avoid navigating unchartered legal waters[28] by simply obtaining a warrant, rather than trying their chances at outsmarting a suspect in the hopes of making a warrantless arrest in a public place and then hoping for a favorable decision from a court. However, if an officer decides to go the route of a lure, he should understand that a court will not condone an unfair ruse, i.e., one that renders a suspect's consent involuntary. Thus, a lure that involves an inappropriate inducement or pressure will not be upheld. It is truly difficult to predict where the appropriate line might be drawn. Certainly, representing that the occupants should evacuate because of a suspected gas leak when officers do not have a warrant is too unfair to be tolerated. This sort of representation would cause almost anyone (the criminal and the law abiding alike) to yield and would therefore be so coercive as to make consent involuntary.

Moreover, even if there is no legal obstacle to using deceit to lure a defendant out of his home so that he may be arrested without a warrant, doing so might prove regrettable if things don't go as planned. For example, if the defendant opens the door, but remains in the threshold and doesn't come outside, he may not be arrested in his doorway.[29] Moreover, if the defendant comes outside and then retreats inside any subsequent hot pursuit by officers is open to the legal challenge that the officers improperly created the exigent circumstances.

Given the concerns expressed in Bosse, supra, it would seem to be less problematic if a lure is used by an officer who conceals or misrepresents his identity (even if he also

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[27] Superceded by statute as stated in In re Lance W., 37 Cal. 3d 873, 694 P.2d 744 (1985).

[28] It should be emphasized that any argument that deceit used to lure a suspect out of his home so that he may be subjected to a warrantless arrest is an unreasonable seizure truly should not succeed. However, in the absence of a binding case in our jurisdiction condoning such a practice, there is somewhat of a hesitation to recommend it.

misrepresented his purpose) in order to effect an arrest in a public place. Again, there is no case from the U.S. Supreme Court, the Ninth Circuit, or the Nevada Supreme Court addressing such a scenario, and so it is not certain how that may be viewed in our jurisdiction. In all likelihood, such a ruse will be found lawful, again, as long as it is not the sort that would cause almost anyone to yield and would therefore be so coercive as to make consent involuntary (e.g., pretending to be an employee of a gas company acting on a report of a gas leak). However, to be safe from a legal perspective, it would be advisable, perhaps in an excess of caution, to obtain a warrant[30] rather than using a ruse to cause the intended arrestee to leave the premises. A warrant is always the officer's best protection.

e) Observations on deceit.

Generally speaking, there are a great number of inconsistencies in the way deceit is treated by the courts, making it very difficult to categorize and discuss the myriad of contexts in which deceit may be an issue. For example, some courts, emphasizing the rationale in Lewis v. U.S., supra (See footnote 16 of this Course Outline) – i.e., that deceit as to identity to gain entry into premises being used for illegal business is justified because the premises have been converted into a commercial center and that there is therefore nothing objectionable about an undercover officer gaining a consensual entry "for the very purpose contemplated by the occupant," – will not allow ruse entries where the premises cannot be fairly said to have been converted into a commercial center of criminal activity. State v. Pi Kappa Alpha Fraternity, 491 N.E. 2d 1129 (Ohio 1986) cert. denied, 479 U.S. 827, 107 S.Ct. 104 (1986) (Undercover law enforcement officers investigating allegations of illegal activities were not privileged to deceptively gain entry into fraternity house without warrant, where fraternity house was not

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[29] See, footnote 19, supra.

commercial center of criminal activity and officers were not invited to fraternity house for purposes of conducting illegal sale of liquor). Other courts focus primarily on the fairness of the ruse and/or whether there is a justifiable or reasonable basis for resorting to a ruse. State v. Ahart, 324 N.W. 2d 317 (Iowa 1982) (ruse to obtain entry not permissible where officers didn't reasonably believe criminal activity was afoot). Rather than focus on whether premises have been converted into a commercial center for illegal business, or on the nature of and reason for the ruse, the Ninth Circuit (like the majority of courts) draws a line between deceit as to identity and deceit as to purpose.[31] However, even that ostensibly clear line becomes blurred at times.[32] Frankly, there aren't enough decided cases in our jurisdiction from which to consistently draw clear guidance as to the appropriateness of particular ruses in particular circumstances. Nonetheless, it is hoped that the discussion in Section 6 of this Course Outline is helpful. (Again, see the graph on page 148, which is an attempt, in the absence of well-developed caselaw in our jurisdiction, to summarize the law of deceit, at least with respect to deceit as to identity.)

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[30] Again, courts are very tolerant of all types of ruses when officers have a warrant. See Section 6(c) of this Course Outline.

[31] See Sections 6(a) and (b) of this Course Outline.

[32] Frankly, the distinction made by the Ninth Circuit in U.S. v. Bosse, supra, to its earlier decision in U.S. v. Allen, supra, draws such a fine line that a clear rule is difficult to discern. See, Section 6(b) of this Course Outline. One might fairly ask whether both cases involved deception as to purpose. In other words, when the customs official in Allen, supra, stated that his identification was at home, wasn't he really implicitly saying, in effect, "I am a BLM official on the same business as the other BLM officials?" If so, how is that any less a deception as to purpose than the business license agent's representation in Bosse, supra, that "he's with me"? It could be argued that in both cases the property owners were deceived into believing that the entries at issue were made to accomplish the purposes of the officials whom the officers were accompanying.

Biography

Ron Sailon graduated With Distinction from the University of Nevada, Las Vegas, received his Juris Doctor from Southwestern University and is admitted to the Nevada and California State Bars.

Ron Sailon has been employed by the Henderson City Attorney's office since 1985. He is the attorney in that office primarily responsible for defending lawsuits alleging police misconduct. He has practiced before arbitrators, administrative tribunals, state court (both jury and non-jury), federal court, the Nevada Supreme Court, and the Ninth Circuit Court of Appeals.

In addition to representing police officers and the City of Henderson in police matters, Ron Sailon provides legal advice to municipal officers, departments, and boards, and attends to any legal matters in which the City of Henderson is a party or in which it is interested.

Prior to becoming involved in defending actions against police officers, Mr. Sailon worked for five years in the criminal division as a prosecutor. In the course of his five years as a prosecutor, he prosecuted several hundred criminal trials.