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Search by Consent

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SEARCH BY CONSENT; ENTRANCE GAINED BY FRAUD AND DECEIT; EAVESDROPPING AND WIRE TAPPING

by Jerold H. Israel*

My topics this morning are eavesdropping, search by consent and entrance gained by fraud and deceit. You should be forewarned that these are areas in which the law has been "on the move" for the past few years. Changes have occurred and still more will take place in the future. I will attempt to anticipate some of those developments, but, obviously, the only safe course is keeping up-to-date through continuing education. In covering my assigned topics, I hope to paint with a rather broad brush. It has always been my feeling that the police officer cannot be expected to learn all the minor rules, exceptions to the rules and exceptions to exceptions that a defense lawyer or prosecutor must have at his command. I hope to present a general picture of the difficult problems presented in these areas and suggest means that may be used to avoid those problems.

I

Although my first subject is simply listed as eavesdropping, I would like to expand upon that topic to consider also the closely related problem of secret observation. As a practical matter, clandestine observation may be as valuable an inventory technique as clandestine listening. In considering these techniques together, I intend to point up similarities in legal treatment. It should be made clear, however, that, while closely related, the legal problems each presents are not identical.

As you all know, the Fourth Amendment prohibits illegal searches and seizures, and requires that the fruits thereof be excluded from evidence. It is sometimes said, however, that you can only have an illegal search and seizure when there is a physical seizure of property. Thus it noted that no problems are presented when an officer looks through the window of a car, sees the occupant using narcotics, and later testifies to that fact; or the similar situation when an officer looking through the window of a street storefront, sees someone burglarizing the store, and later testifies to that fact. While it is true that these cases do not present

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serious legal problems,¹ that does not sustain the position that there is nothing to worry about so long as no tangible, physical evidence is seized. You *can* have a search and seizure without a physical seizing of property. You can have a search by observation, by smelling, or by listening.

Let me give you some illustrations. Where it has been thought that homosexual activity was occurring within the confines of a pay toilet, police officers have drilled holes in the ceiling so as to be able to observe the activities of persons within the toilets. Some courts have held that such activity constitutes a search, and must meet the usual legal standards pertaining to probable cause and the need for a warrant.² If these standards are not met, the police officer's testimony as to what he observed within the toilets will be excluded.

Similarly, in the area of electronic eavesdropping, when an officer uses some kind of bugging device, a spiked mike for example, and picks up a conversation, he obviously is not seizing anything tangible. Yet, this activity probably will constitute a search, subject to the usual requirement of probable cause and proper warrant.³ If these requirements are not met, the police official may not use the evidence obtained as a result of his illegal search. This would mean that the tape itself would be excluded, testimony concerning the conversation would be excluded, and testimony and evidence which had been obtained as a result of the eavesdropping would be excluded.

For many years the question as to whether a non-tangible seizure of evidence (usually by secret observation or eavesdropping) was subject to the rules of the Fourth Amendment depended upon whether there had been an unlawful physical invasion of a protected physical area. Two elements were required — first that there be a physical intrusion upon the area involved,⁴ and, second that that area be one constitutionally protected from that invasion.⁵ In the case I mentioned previously, that of the officer who looked through the window of a car parked in the street, neither element was present. There was no physical invasion so long as the officer was only looking into the vehicle and did not, for example, reach into the car. Moreover, the area involved — the inside of the car — was open to view by any member of the public and hardly could be considered a "protected premises" insofar as simple observation is concerned. Accordingly, the officer had not engaged in a search and he did not need probable cause to justify his action. He could testify to what he saw without regard to normal Fourth Amendment restrictions.

On the other hand, some cases of non-tangible observation clearly did involve a physical invasion. Take the case in which officers, without

¹ *People v. Mallory*, 2 Mich. App. 359; *Boyd v. United States*, 286 Fed. 930 (4th Cir. 1923). See also *United States v. Lee*, 274 U.S. 559 (1927).

² See *e.g.*, *Bielicki v. Superior Court*, 371 P. 2d 288, 21 Cal. Rep. 552 (1962).

³ *Silverman v. United States*, 356 U.S. 505 (1961).

⁴ See *e.g.*, *Jones v. United States*, 339 F. 2d 419 (5th Cir. 1964).

⁵ See *e.g.*, *Hodges v. United States*, 243 F. 2d 281 (5th Cir. 1957).

probable cause, broke into the house, and then observed people in the next room engaged in illegal activities. Assume these officers later made arrests and wanted to testify as to what they observed. Since their action in breaking into the house clearly constituted a physical invasion of protected premises, their testimony would not be admitted.⁶

The presence of physical penetration was not always an issue to determine. A detectaphone employed outside the house for purposes of hearing conversations within was upheld as not constituting a physical invasion.⁷ On the other hand, a spiked microphone that was first attached to the wall, even though there was a minimum penetration, did constitute a physical invasion.⁸ This type of distinction could be carried to preposterous extremes. We had a California case, for example, where an officer followed a prostitute and customer to her hotel room and, by peeking through a hole in the hotel door, observed the prostitute plying her trade. Later when the officer tried to testify to this, the question arose as to whether there had been a physical penetration of that room. The court suggested that this might depend upon whether the officer had drilled the hole in the door or whether it had been there before. Apparently in some areas holes had been drilled into all the doors in this particular type of hotel, and in that case the officer himself would not have physically penetrated the premises.⁹ Similarly, in the pay toilet cases, there was some concern as to whether the observations came from vents which are a natural part of the physical layout, or whether special holes had been drilled in the ceiling for observation purposes.

A recent Supreme Court decision suggests that courts need no longer concern themselves with this type of issue. *Katz v. United States*,¹⁰ decided in December 1967, seems to establish new guidelines in determining when observation on eavesdropping will constitute a search subject to the Fourth Amendment.¹¹ The defendant Katz was convicted of transmitting wagering information from Los Angeles to Miami, a federal offense. At trial the Government attempted to introduce evidence of the defendant's end of telephone conversations overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the defendant had placed his calls. The case was presented to the United States Supreme Court and raised two issues:

Whether physical penetration of a constitutionally protected area

⁶ See *McDonald v. United States*, 335 U.S. 451 (1948); *Whitley v. United States*, 237 F. 2d 787 (D.C. Cir. 1956).

⁷ *Goldman v. United States*, 316 U.S. 129 (1942).

⁸ *Clinton v. Virginia*, 377 U.S. 158 (1964) rev'd. 204 Va. 275 (1963); *Silverman v. United States*, 365 U.S. 505 (1961).

⁹ *People v. Ruiz*, 146 Cal. App. 2d 630.

¹⁰ 389 U.S. 347 (1967).

¹¹ The *Katz* case was decided after October 11, 1967 lecture at East Lansing and the following is a substantial revision of what was said there.

is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

The United States Supreme Court gave a flat answer to the first question — “no,” physical penetration is not necessary. If Katz’s conversation within the booth was entitled to Fourth Amendment protection, the eavesdropping would constitute a search irrespective of whether the bugging device was located inside or outside the booth. The distinction formerly drawn between the use of the detectaphone placed outside the wall and the spiked mike which penetrated the wall was soundly rejected. Either constituted a search if the area invaded was protected.

You will recall the second question presented in *Katz* was whether the telephone booth was a constitutionally protected area. The Government argued that even if eavesdropping without physical penetration could constitute a search, all that had been searched there was a semi-public area which was not entitled to constitutional protection. The United States Supreme Court answered that argument in the following words:

. . . Any effort to decide whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

It strikes me that the United States Supreme Court here is not rejecting the concept that some areas are constitutionally protected from search (absent probable cause) while other areas are not; all it seems to be saying is that the degree to which an area is protected depends upon the nature of the invasion. The defendant could hardly complain if police testified as to their observation of his actions in a glass-enclosed telephone booth. It was a different matter insofar as his conversation was concerned.

What he said in the booth, he could reasonably assume was private; what he did obviously was not. Just the opposite situation may be true, for example, in the case of the pay toilet where the mere presence of four walls may be assumed to give one protection against observation, but the paper-thin quality of the walls may put one on notice that his conversations are likely to be overheard.¹² The crucial question, as *Katz* poses it, is whether a reasonable man could assume that he would be free from the type of invasion presented in a particular case. Of course, even if the answer to this question is "yes," this does not mean that evidence as to what was observed or overheard cannot be introduced. A "yes" answer only means that the search is subject to Fourth Amendment limitations relating to probable cause and a proper warrant. If these limitations are met, then the search will be upheld.

How does *Katz* affect cases of secret observation? When will observation constitute a search subject to the Fourth Amendment? The answers to these questions seem fairly clear in some places, not so clear in others. First, it would seem that if a person is observed in an area that is not even protected for constitutional purposes against physical invasion and search, such observation should not bring the Fourth Amendment standards into play any more than would the physical search. It might be useful therefore to consider those areas which an officer can physically invade and search without regard to Fourth Amendment limitations.

The traditional rule is that, insofar as residential premises are concerned, constitutional protection includes only the curtilage. The term "curtilage" is ordinarily defined as the "dwelling area and that area which is immediately adjacent to the dwelling area." However, this definition raises two types of problems. First, what about structures that are not immediately adjacent, for example an unattached garage? Is that part of the curtilage or can an officer just walk into an unattached garage at will on the grounds that it is not protected by the search and seizure laws? There is some dispute on this point.¹³ It is very clear that attached garages are part of the curtilage. Yet I would hesitate to rely on the theory that because a garage is unattached it is not part of the dwelling and, therefore, you can enter and look around at will. It strikes me that a garage is close enough to the house and is used for purposes sufficiently related to the normal dwelling purposes that you must consider the garage to be part of the dwelling, part of the curtilage, and constitutionally protected — at least against physical invasion. Now some may disagree with me on this, but at least that is the safe way to play it.

Now, what about other buildings such as barns, smoke houses, chicken houses, and similar structures that generally are far removed from a house

¹² Cf., *People v. Young*, 214 Cal. App. 2d 143.

¹³ Compare *People v. Oaks*, 251 Mich. 253 (1930) with *Care v. United States*, 231 F. 2d 22 (10th Cir. 1956). See also *Walker v. United States*, 225 F. 2d 447 (5th Cir. 1955).

or dwelling. Again, there is some division on this point.¹⁴ For some courts a barn is just like a man's office, and since a man's office is protected against a search unless the officer has probable cause and a warrant, the barn should be also. On the other hand, other courts have argued that, if an officer walks into a barn, it is just like walking in an open field and anything he happens to see is his to look at and, if it is contraband, to take. I certainly think, however, that you are risking ultimate reversal if you treat the barn as the equivalent of an open area, at least where the doors are closed. In this situation I think the officer should, if at all possible, establish probable cause and get a search warrant.

What about fields, fenced and unfenced? When are they part of the curtilage? You have two extremes. On one hand you have a man's fenced-in back patio, twenty feet by twenty feet, surrounded by shrubbery. If you are going to physically invade and inspect that area, you will probably be conducting a search for constitutional purposes, just as you would if you were inspecting the inside of the house. On the other hand, if you are just walking across a farmer's back acres, perhaps land that is not even fenced, then you have quite a different situation. You may well be trespassing but your "search" will not be subject to constitutional objection because the open field simply is not a protected area. Both the United States Supreme Court and the Michigan Supreme Court have so held.¹⁵

Now, I have suggested so far that the home, the garage, and the barn (at least in some situations) are constitutionally protected against a physical search. Would the same be true of an observational search of those structures by a person located outside the structure? Even if an officer could not enter for the purpose of making a search (absent probable cause, etc.), could he observe the occupants within one of these structures by looking through a window, an open door, a skylight, etc. Going back to *Katz*, it is clear that the constitutional protection given to an area may vary with the type of invasion of privacy involved. We have always known, for example, that while an officer had to meet Fourth Amendment standards to *enter* and search a car, there was no difficulty when he inspected the inside of the car by merely looking through the window.¹⁶ Would the same be true of house, barn, garage, etc.? Yes, if the officer, like the one looking through the car window, was in a place where he clearly had a right to be; e.g., in the public street.¹⁷ But what if he peers through the window from the front porch or from a window at the side of the house. How will that be decided in the light of *Katz*?

¹⁴ Compare *Walker v. United States*, 225 F. 2d 447 (5th Cir. 1955) with *Hodges v. United States*, 243 F. 2d 281 (5th Cir. 1957).

¹⁵ *Hester v. United States*, 265 U.S. 57 (1923); *People v. Ring*, 267 Mich. 657 (1934). But *cf.* *People v. Ubbes*, 374 Mich. 571 593-595 (1965).

¹⁶ See note 1, *supra*.

¹⁷ Or the public portions of a store. See *Fisher v. United States*, 205 F. 2d 702 (D.C. Cir. 1953).

The courts could say that every person is aware that someone might come upon his property and look through windows, and therefore, so long as the shades are up, etc., such a person is no more protected against secret observation than Mr. Katz is in his telephone booth. I doubt, however, that that will be the case. The courts are much more likely to make their answer dependent upon whether the officer had a "trespassory purpose" — i.e., whether his purpose in approaching the house or garage was solely to look through the window. A similar approach has been suggested in a related context.

Assume an officer knocks on a door, the occupant opens it to see who is there, and, as he does, the officer spots narcotics on the table. There will be difficulties here if the officer says that the reason he knocked in the first place was because he wanted to see if the occupants would "open up" so that he might take a peek at what was inside.¹⁸ There would be no difficulty, however, if the officer knocked on the door because he wanted to talk with the occupant, and happened to notice the narcotics on the table when the door opened.¹⁹ At that point the visual observation would not constitute a "search" for constitutional purposes; yet it would provide probable cause for an arrest and a search incident to that arrest.

I believe this same type of approach will be applied to observation "searches," where the observation is made from defendant's property as opposed to a public place. However, if the observation made from defendant's property could be made only through the use of mechanical aids, i.e., ladders, binoculars, etc., the courts may find this constitutes a search even where the officer came upon the premises for some purpose other than making the search. Under *Katz*, such observation arguably is the type of invasion to which an occupant can reasonably assume he will not be subject even from persons coming upon his property in the normal course of social or commercial activities.

Under this type of analysis, it will be important to determine whether a particular observation is made from a general public area, i.e., one to which the public generally is invited. Take the case of a hotel, for example. What will be the status of the hallways on the second, third, fourth or fifth floor of the hotel? I am not talking about going inside a room but only the hallways. It is sometimes argued that only the first floor is open and after the first floor you are not supposed to be up there unless you are a guest. This view, however, is not consistent with the realities of normal hotel practice. I think that this is a semi-public area and subject to a visual search. There is no reason why officers cannot be posted and observe what is happening in the hotel corridors, such as entry

¹⁸ *Cf.*, *Brock v. United States*, 223 F. 2d 681 (5th Cir. 1955); *California v. Hurst*, 211 F. Supp. 387 (D.C. N.D. Cal. 1962), Affirmed 325 F. 2d 891, reversed on other grounds 381 U.S. 760 (1965).

¹⁹ *Polk v. United States*, 291 F. 2d 230 (9th Cir. 1966); *Ellison v. United States*, 206 F. 2d 476 (D.C. Cir. 1953).

and departure from a particular room. There is no more reason why you cannot take this action than park across the street from a man's house, and observe who is going in and out. The hotel corridor admittedly is not a public thoroughfare, but it is a semi-public area which is largely open to the public. At least I would take that approach until the courts indicate otherwise. Rooming houses present a greater problem since their corridors sometimes are not open to casual visitors without advance notice. I would suspect that in the rooming house situation it is always best to get some consent before one advances beyond the first floor corridor.

So far, we have considered the impact of *Katz* only upon secret observation. What of eavesdropping? In cases where electronic devices are *not* used, I suspect the standards will be quite similar to those applied to secret observation. If the officer heard what was said while located in a public place, there will not be a search for constitutional purposes. If he was located on the defendant's property, then the crucial issue will be whether he was there as a "trespasser." What was his purpose in being at the side of the house when he overheard a phone conversation through an open window? Was he on his way to the front door, or was he there specifically for the purpose of eavesdropping? These are the kinds of questions that I believe courts will be asking in cases of this kind.

Where electronic eavesdropping is used — at least where used to pick up a conversation within a household, office, telephone booth, hotel room or other area in which one cannot readily anticipate being overheard — the eavesdropping will constitute a search for constitutional purposes. This means a warrant will be needed. I will not go into the requirements of the warrant, whether a judge in Michigan could issue one without a specific statute, etc. I think it is enough to say that if you intend to use electronic eavesdropping equipment, you will clearly need the assistance of counsel in obtaining a warrant; and you will not be able to sustain the search without the warrant.

Having stated this as an absolute, there is one limitation I should clearly make. I have been speaking so far about eavesdropping without the consent of either of the parties. When one of the parties consents, it is an entirely different situation. Thus, the courts have had little difficulty with the admissibility of tapes of conversations between the defendant and informers who were wired for sound — at least where used to corroborate the informer's own testimony.²⁰ Similarly, there is no constitutional objection to taping interrogations in police stations. Although one may argue that the interviewee should know that what he says is being recorded, as far as the law presently is concerned, it is adequate that either one of the parties knows this, and, of course, the police interrogator would always be aware of it.

²⁰ *Lopez v. United States*, 373 U.S. 427 (1963).

A word should also be said about wiretapping by police officers. If taps are to be admissible in court, the officer must have a warrant. Even with the warrant, however, the officer should be aware that if he divulges the contents of what he heard, even on the witness stand, he is technically violating a federal statute that prohibits all interception and divulgence without the consent of one of the parties.²¹ Of course, this factor may be viewed by state judges as precluding issuance of a warrant for wiretapping. So far, we have no ruling on that point.²²

II

I would like now to turn to the area of search by consent. This topic is not really related to the subject of secret observation and eavesdropping except in one sense: as in that area, there is the potential here for legal acceptance of a search without meeting the Fourth Amendment requirements of probable cause and valid warrant. If there is truly voluntary consent to a search, then the individual has, in effect, waived any potential objection to the possible illegality of the search under Fourth Amendment standards. The crucial question therefore is what constitutes truly voluntary consent. The Michigan Court of Appeals has said:

It is well established that one may consent to have his person or property searched by police officers, but such waiver or consent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given.²³

A heavy burden will be placed on the prosecutor in showing a voluntary consent; the courts have traditionally said that they will not lightly indulge in the assumption that a man would waive his constitutional rights by voluntarily consenting to a potentially illegal search.

Whether there has been true consent is often a matter of dispute. I am always very wary of relying upon consent to justify a search since it so frequently involves disputed testimony. An officer will testify that he told the resident of his rights and that the resident freely consented to the search, while the resident will state that he never consented, but that the officer forced his way into the house and conducted the search against his will. It is so much easier, at least for the prosecutor, if the officer had a warrant and there was no need to rely upon consent. However, this cannot always be the case. I would therefore make the following suggestions in consent situations. First, the more corroborating witnesses you have, the stronger your case. Two officers are less likely to be disbelieved than one. Second, use of a "consent form" is helpful.

²¹ 47 U.S.C. § 605. See *Benanti v. United States*, 355 U.S. 96 (1957).

²² See *People v. Maranian*, 350 Mich. 361 (1957).

²³ *People v. Nawrocki*, 6 Mich. App. 46, quoting *People v. Kaigler*, 368 Mich. 281 (1962).

Consent forms are not generally used by Michigan police, but police in other states including Illinois use them, as does the FBI.²⁴ The consent form is a printed form given to the individual, warning him of his rights and stating that his signature gives his consent to a search. Any prosecutor can prepare one. Use of such a form does not guarantee that you are going to win your case, but at least it gives you concrete evidence that there was consent. If, however, the man refuses to sign, you are going to have a hard time proving he ever consented by oral acquiescence.²⁵

Of course, even where the fact finder accepts the proposition that the individual actually agreed to the search, the consent still may be rejected on the ground that it was not voluntarily and freely given. There are several factors the courts look to in determining whether a consent was truly voluntary. One is whether the man was in police custody.²⁶ If he was, that does not mean that he was automatically incapable of voluntary consent, but it does suggest that he was under pressure to consent and that he may have submitted to a search only because he thought that he had no alternative. So when a man is in custody, particularly when he is in jail, you must be especially careful in establishing a valid consent.

Even when a man is not formally in custody, there may be similar factors that will cause courts to find that consent was not voluntary — for example, a show of arms by the officers, or the fact that the request came from several officers appearing at the door in the middle of the night.²⁷

Another factor is the initiation of the suggestion of a search. If the individual himself first suggested that the police make a search, it is easier to prove a voluntary consent. Consider the case of a wife who complained that her husband was threatening to shoot her. The police came over, arrested her husband, and then asked her for permission to look around for a gun. Although she had not initiated the idea of a search, she had initiated the entire proceeding. The court was very willing to say that obviously she wanted them to search for the gun, and therefore her consent was completely voluntary.²⁸

In most cases, however, it is the officer who initiates the suggestion of a search and asks for consent. Exactly how the request is phrased will be very important. Did he say, "I am here to search your house, any objections?" In that case, even if the person agreed, the court is likely to say, "No valid consent."²⁹ Or did the officer say, "Would you mind if I searched

²⁴ See *e.g.*, *People v. Rogers*, 133 N.E. 2d 16, Ill. 2d 279 (1956).

²⁵ *Pekar v. United States*, 315 F. 2d 319 (5th Cir. 1963).

²⁶ See *Judd v. United States*, 190 F. 2d 649 (D.C. Cir. 1951); *Channel v. United States*, 285 F. 2d 217 (9th Cir. 1960). See also *State v. Herring* 421 P. 2d 767, 77 N.M. 232 (1966).

²⁷ See *Catalanotte v. United States*, 208 F. 2d 264 (6th Cir. 1953); *United States v. Marquette*, 271 Fed. 120 (D.C. N.D. Cal. 1920); *United States v. Roberts*, 179 F. Supp. 478 (D.C. Cal. 1959).

²⁸ *People v. Shambley*, 122 N.E. 2d 172, 4 Ill. 2d 38 (1954).

²⁹ See *People v. Kaigler*, 368 Mich. 281 (1962); *Farris v. United States*, 24 F. 2d. 639 (9th Cir. 1928).

your house? If you say no, I will turn around and go away.” Obviously this type of statement makes it much easier for the judge to find a voluntary consent.

The significance of the form of the request for consent suggests an interesting question that is being raised by defense counsel throughout the land. *Miranda* holds that before you interrogate a man you have to warn him of his rights.³⁰ Do you have to do the same thing before you ask him to let you search his car or house? The Nebraska,³¹ Kansas,³² Illinois,³³ Washington,³⁴ and Louisiana³⁵ courts have all indicated that you do not have to give similar warnings. I would not rely on that though. There are a few courts that have ruled the other way³⁶ and undoubtedly this problem will eventually be decided by the United States Supreme Court. That Court has indicated that it might very well extend the *Miranda* principle to search and seizure situations. Therefore, I certainly think, if possible, one should “play it safe” and attempt to give appropriate warnings in requesting consent to search.

What should such warnings contain? What are the defendant’s rights in this situation? I think the first thing you have to tell him is that he does not have to let you search the house or the car. The second is that he can insist that you go out and get a warrant (unless you intend to make a search incident to an arrest). Third, he should be warned that any evidence that you find can be used against him. Finally, I think you should also tell him that he has the right to consult a lawyer, if he wants to, or to consult anybody else. I do not believe, however, that you have to tell him that he has a right to an appointed lawyer, because I do not think he has that right under these circumstances. Certainly the police officer cannot seek appointment of a lawyer in this situation. In fact, the circuit court probably lacks legislative authority to appoint counsel prior to the individual’s arrest.

I think if you give these warnings in an effective manner, you aid your consent case. It makes it much easier for the court to find a truly voluntary consent. If the defendant knew that he did not have to consent, that the police could have been required to get a warrant, that any evidence found would be used against him, and that he could consult with someone before he gave his permission, then he has substantially less basis

³⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³¹ *State v. Forney*, 150 N.W. 2d 915, 181 Neb. 757 (1967).

³² *State v. McCarthy*, 427 P. 2d 616, 199 Kan. 116 (1967) (involving the retroactive application of *Miranda*).

³³ *People v. Trent*, 228 N.E. 2d 535 (Ill. 1967) (involving the retroactive application of *Miranda*).

³⁴ *State v. Johnson*, 427 P. 2d 705 (Wash. 1967) (refusal to apply *Escobedo* to search area).


³⁵ *State v. Andrus*, 199 So. 2d 867, 250 La. 765 (1967).

³⁶ See *United States v. Barton*, 1 Criminal Law Reporter 2145; *United States v. Goggenheim*, 1 Criminal Law Reporter 2127.

for arguing that his consent was not voluntary.³⁷

Of course, even if the warnings are given, there may still be some problems. Courts will also look to the spontaneity of the defendant's response to the police request, i.e., the need for police persistence to gain agreement. If you ask a person's consent for a search of his house and he says "no," even though you could spend 15 minutes convincing him that he should change his mind, you are very unlikely to get a court to uphold the subsequent consent.³⁸ The original negative response is likely to be the decision that stands. Of course, there may be occasional cases where this will not be true. For example, the individual may have had doubts as to the officers' identity and may have changed his mind after he was satisfied that they were indeed plainclothes officers. Generally, however, if you have to persist or pester to obtain consent, you are going to run into problems.

Another factor to be considered, even where warnings are given, is the individual's capacity to understand. Do not expect to get a valid consent from a drunk, a child, or a seriously retarded person.³⁹ In fact, we have one case suggesting that you cannot get a valid consent from a harassed housewife.⁴⁰ The policeman there approached the woman shortly after her husband and 16 year old son had returned home badly wounded in a burglary attempt, had been treated by a doctor, and then had been whisked away by the police. The housewife denied that she had ever consented to the search, but the police claimed otherwise. The court held, however, that she had been so upset and harassed that even if she had consented, her action would not have been "voluntary."

 Of course, the consent must extend to the specific area searched. You have a famous Michigan case in which the police stopped an individual for a traffic violation, and asked him if he had any contraband in his car.⁴¹ He said, "No, go ahead and search the car." The police were looking for gambling paraphernalia, and after finding nothing in the car, they asked the defendant if he had any materials on him. He had already given his consent to search the car, but when the officer reached over to search his person, the defendant drew back. The officer persisted, searched his pockets, and found gambling materials used in connection with football pools. The police sought to introduce these materials in evidence and the court held they were fruit of an illegal search. Although the man had consented to the search of his car, once the police started talking about searching his person, he had drawn away from the officer. It was obvious that he was not as willing to have his person searched as he was his car,

³⁷ See *e.g.*, *Rogers v. United States*, 369 F. 2d 944, (10th Cir. 1966); *State v. Gates*, 150 N.W. 2d 617 (Iowa 1967); *Gorman v. United States*, 1 Criminal Law Reporter 2189.

³⁸ *Pekar v. United States*, 315 F. 2d 319 (5th Cir. 1963); *United States v. Ziemer*, 291 F. 2d 100 (7th Cir. 1961).

³⁹ But *cf.* *People v. Chyc*, 219 Mich. 273 (1922).

⁴⁰ *People v. Lind*, 18 N.E. 2d 189, 370 Ill. 131 (1938).

⁴¹ *People v. Ziegler*, 358 Mich. 355 (1959).

and with good reason. The consent did not extend to the search of the person, and that search therefore had to be tested by Fourth Amendment standards. Under these standards, of course, search of the person is not justified as incidental to a traffic offense arrest.

The consent also must be current. In this connection, a recent Michigan Court of Appeals case upheld a search in a strictly borderline situation.⁴² The police arrested a man and asked him if they could search his car. The defendant gave his permission. The police searched the car but found nothing. They took the defendant to the station and gave him back his keys. He was booked, and he turned over his keys to the jailer. The officers later returned and obtained the keys from the jailer. Their second search was successful. They justified it in court on the consent the defendant originally gave when first arrested. The theory was upheld, but the police here took a considerable gamble. The court could easily have decided the other way. At the time of his consent the defendant was not in jail and he was not sure he was necessarily going to jail. If the officers wanted consent for another search they probably should have gone back to the defendant and asked him again. Preferably, they should have obtained a warrant so they would not have to tie their case to consent at all.

There is one other aspect of consent which should be mentioned and that is third-party consent. We are talking about consent by a person other than the defendant. The usual rule is that valid consent can be given by any person with a sufficient interest to have possession and control of the premises being searched. That means, for example, that the husband or the wife can give permission to search the house.⁴³ The landlord *cannot* give permission to search his tenant's quarters since he does not live in, nor have possession or control of the tenant's quarters.⁴⁴ He can demand entry on occasion to collect the rent or to find out if the tenants are damaging the furniture, but he does not have the right to authorize the police to enter. The same is true for the hotel or motel manager, with respect to a room presently leased.⁴⁵

On the other hand, a wife has complete control of the household. She can authorize a search, and, if the police find something that points to the guilt of her husband, they generally can use that evidence despite his complaints about the validity of the search. There are certain limits, however. First, the property searched must be jointly owned or occupied. If the wife has left the household and she comes back to visit the husband once every six months, it is not really her house and she cannot give you

⁴² *People v. Nawrocki*, 6 Mich. App. 46.

⁴³ See *e.g.*, *United States v. Heine*, 149 F. 2d 485 (2d Cir. 1945); *People v. Penoni*, 153 N.E. 2d 578, 14 Ill. 2d 581 (1958).

⁴⁴ *Chapman v. United States*, 365 U.S. 610 (1961).

⁴⁵ *Stoner v. California*, 376 U.S. 483 (1964). See also *State v. Roff*, 424 P. 2d 643 (Wash. 1967).

consent.⁴⁶ Also, her consent must be totally voluntary. I think therefore that ordinarily the officer ought to tell the wife why he is searching the home. For example, if the husband's under arrest, the officer had best tell the wife this and state that he is searching the house to find evidence against the husband. She also should be given the appropriate warnings as to her own rights.

Finally, there may be areas where one spouse cannot consent to search. While a wife can invite you to conduct a general search of the house, perhaps she cannot authorize a search of her husband's toolbox; that may belong solely to him.⁴⁷ The same may be true of a car which is registered in the husband's name and is regularly used only by him.

A special problem arises when one of the parties objects. If the husband is present when the search request is made, and the wife gives her consent but the husband does not, I would advise *against* relying on the consent.⁴⁸ Go back and get a warrant and then you are safe. Of course, there may be a likelihood of destruction of evidence, and then you will have to take your chances on the consent.

Another difficult area of third-person consent arises out of the parent-child relationship. A parent can consent to the search of a minor child's bedroom.⁴⁹ A child cannot consent to the search of a parent's house.⁵⁰ We had a recent case in which the Michigan Court of Appeals, without much discussion, held that a grandmother, who owned the house, could not consent to the search of the bedroom of a grandson who lived in her house.⁵¹ While the court did not emphasize this point, the grandson was over 18 and might well have been viewed as an adult boarder. Generally, the person who owns the house, the head of the household, can consent to the search in these situations.

The validity of consent given by temporary residents depends on the nature of the individual's position. A babysitter left to care for the children over an entire weekend obviously has more authority than a babysitter who is in the house only for a couple of hours. Similarly, a household painter cannot validly consent to search the whole household, but a visiting mother-in-law, placed in charge of the household, might be able to do so.⁵² It is the police officer's duty to find out who is consenting to the search and to make sure that this person is one who is likely to have authority. If the person is only a temporary resident, the officer should examine the situation closely before relying upon the consent.

Of course, even though a person may not be able to permit you to search the premises, he may be able to permit you to enter the house.

⁴⁶ See *People v. Weaver*, 241 Mich. 616 (1928).

⁴⁷ See *e.g.*, *State v. Evans*, 372 P. 2d 365 (Hawaii 1962).

⁴⁸ *Cf.*, *Tompkins v. Superior Court*, 378 P. 2d 113, 27 Cal. Rep. 889 (1963).

⁴⁹ *Maxwell v. Stephens*, 229 F. Supp. 205 (D.C.E.D. Ark. 1964).

⁵⁰ *People v. Jennings*, 298 P. 2d 56 (Cal. 1956).

⁵¹ *People v. Overall*, 7 Mich. App. 153.

⁵² But *cf.* *Reeves v. Warden*, 346 F. 2d 915 (4th Cir. 1965).

For example, a child answers the door, and, although he cannot permit you to search the house, he can let you in.⁵³ That may be enough if, for example, the officer immediately sees contraband lying on a table. Since the officer was properly on the premises, his observation will not be viewed as a "search" subject to Fourth Amendment standards, and subsequent action can be based on probable cause furnished by the observation.

In addition some people can give you authority to inspect certain portions of a building. For example, a janitor cannot let you into an apartment, but he can let you look through the basement, through the hallways and through those general areas to which all tenants generally have access. (Of course, if these are semipublic areas, akin to hotel hallways, then not even the janitor's consent may be necessary.)

III

My last topic of discussion concerns method of obtaining entry. This relates to both of the other topics. If a person obtains entry by fraud, and then observes improper activities, does his observation become a search for constitutional purposes because of the fraud? If he uses fraud in obtaining consent, is it a valid consent? Courts have just begun to take a long and careful look at these questions.

What are the rules established to date? An officer cannot misrepresent himself as having a warrant when he does not.⁵⁴ Misrepresenting identity, however, is another matter and dependent on the circumstances. Assume that a plainclothes officer approaches a place where the occupants are selling narcotics, and gains entry by identifying himself as "Joe Doe," sent by "Bill Smith" to make a purchase. Upon entry, he sees narcotics activity and makes an arrest. His misrepresentation should not vitiate his action.⁵⁵ He was invited into the premises, and in no way used his misrepresentation to force admittance. He is entering what is, in effect, a place of business as a customer. On the other hand, if he identifies himself as the gas inspector who has to check on something, then he is running into trouble, since he is not really being invited into the house. He is trying to exert public authority as an inspector to gain entry. Some authorities argue the same would be true if the police officer gained entry as a door-to-door salesman.⁵⁶ The answer here is not so clear. However, this technique is rarely necessary. The use of misrepresentation to gain entry is primarily in the areas of narcotics and gambling, and here the policeman can pose as a customer. This pose has clearly been accepted by the courts.⁵⁷

⁵³ See *Davis v. United States*, 327 F. 2d 301 (9th Cir. 1964).

⁵⁴ *Salata v. United States*, 286 Fed. 125 (8th Cir. 1923).

⁵⁵ *Lewis v. United States*, 385 U.S. 206 (1966).

⁵⁶ *United States v. Mitchneck*, 2 F. Supp. 225 (D.C. Pa. 1933).

⁵⁷ See *Lewis v. United States*, 385 U.S. 206 (1966); *United States v. Bush*, 283 F. 2d 51 (6th Cir. 1960).

Questions and Answers

Jerold H. Israel

QUESTION: An adult relative is living in a room of someone's house. Perhaps this resident is the sister or sister-in-law of the married man owning the residence. Can the owner of his house authorize a search of the occupant's room?

ANSWER: I think the situation becomes very questionable if that relative lives in and permanently occupies the room. Certainly the owner can authorize the searching of the rest of the house. In the *Overall* case, concerning the grandmother who consented to a search of an adult grandson's room, the Michigan Court of Appeals held the consent invalid even though the grandmother owned the residence. That case seems controlling. Of course, there is little discussion on the point, and the court might distinguish the case in a proper situation. Yet, leaving *Overall* aside, there are other problems in relying on consent in this type of case. You may find later that the relative was paying rent. Even if he or she cleans house, does the dishes, etc., this might be the rent payment. Obviously this is a fact that the officer could not discover in the first instance, yet if it made the sister or sister-in-law a tenant, you would not have a case, even if *Overall* were distinguishable. Because of these hidden booby traps concerning the occupant's status, I think you are safest in not searching. However, if you need the information immediately, you are going to be forced to take a chance and gamble.

Another problem arises where two unmarried people of the opposite sex are living together. The courts have held that these individuals are joint tenants, and as such I would treat them like man and wife, meaning that either can give his or her consent to a search. To clarify this point of joint tenancy, we are assuming that these people are, in fact, living together, rather than, for example, a fellow having one girl over on Monday and another in on Tuesday.

The courts have not dealt with the problem of husband and wife living together but having separate bedrooms. I would not worry about that, however, unless it is clear to the officer that this is the case. Obviously, it is not a police officer's responsibility to seek out all the details concerning a couple's marital relationship before making a search.

If an officer can reasonably determine that an individual seems to have the authority to sanction a search, then he should go ahead and do so — but beware of the adult occupant situation.

QUESTION: The following hypothetical question is in two parts: A person has rented a room in a rooming house or motel-apartment building. The subject is behind in rent payments and the landlord believes the subject has moved out. The landlord also felt that while a resident, the

subject's actions were of a suspicious nature. The police are called to enter and search, and as a result contraband is found. Is this search an illegal one if (a) the resident has in fact *not* moved out, or (b) the subject has left?

ANSWER: I think the crucial point, in this situation, is the reasonableness of belief that the subject has abandoned the property not whether he has in fact. The fact that he is behind in his rent is irrelevant so long as he still has a lease on the property. The key issue is whether the facts obtained from the landlord would support a claim of probable cause to believe the property has been abandoned. Of course, if the search reveals that the subject is still living there, you may have a more difficult time in showing how you had reasonable cause to believe he had abandoned his property.

QUESTION: Are you familiar with a coil device which is put on a phone wire, and yet does not penetrate the wire itself? If so, is this a wire-tap or eavesdropping, and is it legal?

ANSWER: Yes, I am familiar with this device. It constitutes a wire-tap, and as such is a violation of federal law, even though there is no physical penetration of the wire. The interception concept of the Federal Communications Act does not require physical penetration. What you are doing with this device is picking up a telephone conversation from the wires, and such action is subject to Section 605 of the Federal Communications Act.

Of course, this does not necessarily mean that such evidence as is gained through this device would be excluded from the courts. However, you could not hope for admission unless you had a warrant, authorizing the tap. That warrant must meet the standards established in *Berger* and *Katz* by limiting the duration of the tapped conversation, etc.

QUESTION: Would it be a violation of the Federal Communications Act, or an illegal search, if an electronic device were placed on top of or inside a public phone booth located at a gambling establishment?

ANSWER: It would not violate the F.C.C. However, as far as the Fourth Amendment is concerned, *Katz* apparently would treat it as a search, and a warrant would be needed.

QUESTION: What is the advisability of a police department using an illegal wire tap or eavesdrop surveillance in order to gain evidence of future crimes? If the future crime evidence is inadmissible, how far back can this knowledge be pushed before it becomes fruit of a poisoned tree?

ANSWER: If the information leading to future crimes was obtained by illegal wire tapping or eavesdropping, the courts would exclude that information. However, there are limitations to the poison tree rulings. If it is possible for the police to show that they would have obtained the

same information from other sources, or if the future crime is so remote as to no longer be tainted by the wiretap or eavesdropping, the information may be upheld.

Application of the poisoned fruit doctrine is difficult as a practical matter since the defense counsel often does not know there was a wiretap, or cannot prove there was a wiretap if he suspects it to be the source of the prosecutor's information. The federal courts have held that the prosecutor must tell the judge if there has been a tap. Also, once the proceedings have revealed the illegal wiretap, the burden is on the prosecutor to show that all the evidence did not come from the wiretap. If this is applied to local prosecutors, your use of the tap will be presenting them with considerable trial difficulties.

QUESTION: The following is a hypothetical question. A subject is arrested for violation of the check law. During his confinement in the county jail, and while awaiting preliminary hearings, officers go to his home and obtain a signed waiver of consent to search, from his common law wife. Under the waiver the officers are allowed to search for checks and other evidence relative to the case. During the search a revolver is discovered, seized by officers, and after a file check, found to be stolen from a tavern during a burglary six months earlier. Is the first search legal and would the seizure of the gun also be legal?

ANSWER: I would think the first search would be legal if the common law wife gave her consent while being fully aware of her own rights and that her husband was in jail. There are some people, law professors particularly, who are quite concerned about the situation your hypothetical question raises (the man in jail whose wife is confronted for consent to search). The fact of the matter is, however, that the courts have upheld these voluntary consents given by the wife when she knows all the facts. As for seizure of the gun, no matter what the purpose of the search, you can seize contraband found within the appropriate area of search. I assume the gun was found in a drawer or other place where it was appropriate to search for checks. The difficulty here is that the police seized the gun before they made the registration check that showed it was contraband. At the time they seized the gun, they had no basis for taking it.

QUESTION: Can a subject, arrested for driving while under the influence of alcohol, give his consent for a blood test or a breathalyzer examination?

ANSWER: Under Michigan's new statute, the subject can give his consent to these tests when arrested for driving while under the influence of alcohol. Constitutionally, it does not matter whether he gives his consent or not because when the officer made the arrest he had probable cause to believe a crime was being committed. Ordinarily, you might need

a search warrant to conduct this kind of search; but in this case it is not necessary since if you took the time to obtain the warrant all the alcoholic content would have left the subject's blood stream.

Although this statute is labeled "implied consent" you do not, in fact, have to base this statute on consent at all, but on probable cause to make a search. This is the theory on which the implied consent cases will be sustained. However, there is no doubt that the statute seems to be inconsistent when it talks about a valid consent by a driver who is thought to be so intoxicated he cannot handle a car properly.

QUESTION: Once a person living in a residence has given an officer his voluntary consent to search the premises, and the officer has begun the search, can this resident then withdraw his consent?

ANSWER: Yes. The *Miranda* case ruled that a person who starts to waive his rights against self incrimination can always withdraw that consent and I believe the same rule would be applicable to the search and seizure area. Of course, if the resident stops the search at any point, anything the officer has found up to that point is still admissible.

QUESTION: Can a private citizen, not involved in any crime or crime investigation, but purely for personal interest, legally utilize the induction coil to monitor his own phone conversations without the consent of the conversing party?

ANSWER: The Federal Communications Act states that interception is legal with the consent of one party. This case would be no different than a man asking his secretary to listen to an extension and note the conversation. In fact, this practice is common among some attorneys. Recently adopted Michigan C.L. § 750.539(a) does not contain any "consent-by-one-party" exception, but § 750.540 still does and I gather that it controls taps, as opposed to other types of eavesdropping.

QUESTION: Does your previous answer apply to the police officer, acting in this capacity, who records his conversation with someone? In this case can the recording be used as evidence?

ANSWER: Yes, the recording can be used as evidence if (1) it's of his own conversation, and (2) the officer's willing to testify so that the recording corroborates his own testimony.

QUESTION: Are you familiar with parabolic or strategem mikes? If so, would it be an intrusion or an illegal search to monitor conversations from a distance, for example, across the street and into a private home.

ANSWER: Under *Katz*, you could do so only if you had probable cause and obtained a proper warrant. The more difficult question concerns the use of the mike to pick up conversations in public places — e.g. on the street. Can a person here claim that he was relying on the fact that he saw nobody in the street who could overhear his conversation, that he

was, in effect, caught unawares? Certainly, this argument has not been successful where mechanical devices are used for secretly observing a person's activities on a public street. Secret eavesdropping, however, might be treated differently, since the individual's expectations as to observation and eavesdropping are, in common experience, likely to be quite different.